No. 83-5544

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN ELDON SMITH,

Petitioner,

-v.-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ATTORNEY OF RECORD

QUESTIONS PRESENTED

1. Whether prosecutorial threats against a key eyewitness -- no less than promises -- must be disclosed on cross-examination under Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959), if they constituted a possible inducement for the witness's testimony?

2. Whether the refusal to adjudicate the merits of petitioner's admittedly valid challenge to the composition of his trial jury -- in deference to a state procedural rule not uniformly applied -- results in "manifest injustice" under the standard of Wainwright v. Sykes, 433 U.S. 72 (1977)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner John Eldon Smith, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. The slip opinion is attached as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 9, 1983. A timely suggestion for rehearing en banc was denied on September 29, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner John Eldon Smith was convicted in the Superior Court of Bibb County, Georgia, of two counts of murder and was sentenced to death. Petitioner's co-indictee, Rebecca Machetti, also received a death sentence. A third co-indictee, John Maree, received a life sentence on a plea after he testified against petitioner and Machetti.

Petitioner's Claim of Prosecutorial Misconduct

The key to the State's case against petitioner lay in securing the testimony of John Maree against him. Maree had been an undisputed participant in the crime: his handprint was found on the victim's automobile; he had given an extensive confession implicating himself; and he had been identified by a resident near the scene of the crime. Petitioner himself consistently maintained his innocence, and apart from Maree's possible testimony, no other State's witness nor any of the physical evidence placed petitioner at the crime scene.

John Maree did agree to testify against petitioner. however, and he told the jury that petitioner had fired the shotgun blasts that killed the victim while he, Maree, stood by. On cross-examination defense counsel attempted to learn whether Maree's testimony against petitioner had been prompted by any inducements:

> Q: [Defense Counsel] How many times have you talked to [Chief Deputy Sheriff] Mr. Ray Wilkes about this case?
> A: Five or six times.

Q: How many times have you talked to [District Attorney] Mr. Fred Hasty about it?

A: Possibly twice, I think, twice, yes sir.

Q: How many times have you talked to [District Attorney] Mr. Don Thompson who is connected with Mr. Hasty?

A: Once alone with Mr. Wilkes being there and once with Mr. Hasty.

Q: At the time that you talked with Mr. Wilkes in exchange for your statement, were you promised anything?

A: The only thing that was promised me was protection for my family and myself. There were threats involved in this thing.

Q: How about in respect to your liberties, your freedom?

A: Nothing has ever been said of that.

During his closing argument, the District Attorney strongly reinforced the suggestion that Maree's testimony had been volunteered independently without any inducement by the State:

> "I want to tell you one other thing and I am taking up too much of your time. This indictment charges John Eldon Smith a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of murder in two counts. . . As District Attorney of this Circuit, I tell you that those other two defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder . . . . You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise."

(St. Hab. I, Pet. Ex. 10,668-669).[1/]

1/ Each reference to the transcript of the evidentiary hearing held in the Superior Court of Butts County on May 10, 1983, will be indicated by the abbreviation "St. Hab. I." References to the transcript of the June 13, 1983 continuation of the hearing (which is paginated separately) will be indicated by the abbreviation "St. Hab. II."

Seven years after petitioner's trial -- long after petitioner's initial state and federal habeas corpus proceedings been brought -- the former District Attorney who had tried petitioner admitted during a conversation with an old acquaintance that he had bargained with John Maree, prior to petitioner's trial, to recommend life sentences for him if he would testify against petitioner (St. Hab. I, at 81; see also St. Hab. II, at 102). District Attorney Hasty's admission was reduced by petitioner's attorneys to affidavit form. Hasty "read over [the affidavit]. I thought it was true, and I signed it." (St. Hab., II, at 105). Hasty admitted that he understood at the time that petitioner's lawyers "wanted to consider using it in a habeas corpus petition" (id.; see also, St. Hab. I, at 100). Hasty's affidavit included the following averments:

> "3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John Smith and Rebecca Machetti in exchange for sentences of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders."

On June 21, 1982, nearly one month after Hasty had signed the affidavit, one of petitioner's attorneys telephoned Hasty and indicated that his affidavit was to be filed in connection with a state habeas corpus petition asserting a claim under Giglio v. United States, 405 U.S. 150 (1972) (St. Hab. I, at 37). Hasty indicated no objections or hesitation about the use of his affidavit. Four days later, a state habeas petition was filed. Petitioner pursued state habeas proceedings on that claim for eight months, during which time Hasty contacted neither petitioner, petitioner's counsel,

the State Attorney General, the Superior Court, nor the Supreme Court of Georgia to indicate any hesitancy about the affidavit.[2/]

However, on January 12, 1983, Hasty "opened an envelope addressed to me . . . and found that there was a letter from the State Disciplinary Board of the Bar Association." (St. Hab. I, at 84; St. Hab. II, at 110). That letter, announcing the institution of disciplinary proceedings, relied expressly upon the contradiction between Hasty's 1982 affidavit on the one hand and Maree's cross-examination and Hasty's closing argument on the other. The bar charges also rested upon an excerpt from a 1978 deposition, given by Fred Hasty in state habeas proceedings of petitioner's co-indictee, in which Hasty had admitted -- unknown to petitioner's lawyers -- on a second occasion, under oath, that he had made a pretrial deal with John Maree.

Subsequently, during petitioner's state habeas hearing on May 10, 1983, as two State Disciplinary Investigators sat in the courtroom and took notes for possible use in Hasty's disciplinary proceedings (see St. Hab. I, 123, 131-37), Fred Hasty repudiated both his deposition and his affidavit, stating that he had not promised John Maree anything in exchange for his testimony, neither a lighter sentence nor a letter to the parole board. (St. Hab. I, at 76). Hasty explained his radically inconsistent prior statements by suggesting: (i) that he had known prior to petitioner's trial that he would recommend life for Maree if he testified against the Smiths

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2/ Hasty alleged that he informed another lawyer in July of 1982 that the affidavit was inaccurate, but he admittedly took no steps at all to stop its subsequent use by petitioner's lawyers or the state court even though he knew state habeas proceedings were continuing during the fall of 1982. (St. Hab. II, 123-24).

(St. Hab. I, at 77); (ii) that he had not told either Maree or Maree's counsel what he intended to do (St. Hab. I, 77-78); but (iii) that after the trial, his "mind had become somewhat confused about what had actually happened. I think that what I had intended to do and what I actually did had become somewhat merged in my mind." (St. Hab. I, 80-81).

While Hasty thus denied that any formal agreement had been made to grant Maree life sentences in exchange for his testimony against petitioner (St. Hab. I, 76-77)(Hasty); see also (St. Hab. II, 9-10)(Maree), another sort of understanding or arrangement was acknowledged. As John Maree explained in a sworn affidavit submitted by the State:

> The only statement made pertaining to my trial was that if I did not agree to testify, that then D.A. (Fred Hasty) would assign my case to an assistant district attorney for prosecution and that a death sentence would most likely be sought.

(St. Hab. I, Resp. Ex. 1). Willis Sparks, Maree's attorney in 1975, concurred with this account of the pretrial understanding:

> Mr. Hasty did say, as I recall, that if Mr. Morray [sic] did not cooperate, it was quite possible that he would be the first man tried, and the State might well seek the death penalty.

(St. Hab. I, at 50) (See Super. Ct. Order, 5-6, confirming Spark's testimony).

During the state hearing, petitioner sought to introduce testimony which bore directly upon the Giglio claim. The offer was refused. The testimony would have recounted a statement made in a public meeting by since-deceased Assistant District Attorney Donald Thompson, who had tried the case with Fred Hasty. During a December, 1978 debate on capital punishment held in a Macon church (see St. Hab. II, Pet. Ex. 13), Thompson was asked "why there had been the disparity in the sentences received by John Eldon Smith, Rebecca Machetti and by John Maree" (St. Hab. II, at 68; id. at 60-61). According to a Presbyterian minister who vividly remembered and recounted

Thompson's admission, the former Assistant District Attorney explained that "the testimony of John Maree was essential to the case, to get the Machettis, . . . he was very clear that the life sentence was necessary to get the testimony against the Smith-Machettis." (St. Hab. II, 68-69). The State opposed this proffered testimony by Rev. Davis on the grounds that it was hearsay (St. Hab. II, at 61, 65). Petitioner countered that a Georgia statute explicitly permitted an exception to hearsay rules for declaration against interest made by a person since deceased (St. Hab. II, 62-66; See O.C.G.A. §24-3-8 (Michie 1982)).[3/] The State also contended that since there had been no deal, Thompson's statement was not "against interest." Petitioner countered that "[w]hat we have offered to prove is that Don Thompson, the other District Attorney trying this case, had knowledge that there was a deal. That is evidence in itself that there was a deal. That is the whole point for the testimony that Reverend Davis is going to give." (St. Hab. I, at 66). The Superior Court sustained the State's objection, however, and excluded the evidence from its consideration. (St. Hab. II, at 67).

Petitioner's Jury Discrimination Claim

(i) The Merits

Petitioner also alleged that the juries which indicted and tried him systematically underrepresented women, in violation of his Sixth, Eighth and Fourteenth Amendment rights. (Fed.Hab.Petition, §§16-17, 41-48). The factual basis of the claim is clear: Georgia law at the time of petitioner's 1975 trial permitted women with children under the age of 14 to opt out of jury service simply by filling out a postal card, irrespective of any proof of hardship. (Ga. Code Ann. §59-124

3/ Petitioner also contended that to exclude this evidence in reliance upon a narrow state evidentiary rule would violate Green v. Georgia, 442 U.S. 95 (1979).

(repealed by Acts of 1975, pp. 779-80)). As a result of that statute, although women constituted nearly 54 percent of the jury-eligible population of Bibb County where petitioner was tried, they comprised no more than 12 percent of his grand jury pool, nor 18 percent of his traverse jury pool, 42 and 36 point disparities, respectively. As a result, only nine women were included among the fifty prospective jurors presented to petitioner, and after the prosecutor had exercised his peremptory challenges, petitioner went to trial with an all-male jury. The Eleventh Circuit ruled in the appeal of petitioner's co-defendant, Rebecca Machetti, -- whose jury had been selected from the same jury pool, in the same county, within a month of petitioner's trial -- that Bibb County jury rolls in 1975 unconstitutionally underrepresented women. Machetti v. Linahan, 679 F.2d 236, 240 (11th Cir. 1982), cert. denied, __U.S. __, 74 L.Ed.2d 978 (1983).

(ii) The Issue of Waiver

Petitioner's trial attorneys did not challenge, prior to his trial, the Georgia statute under which women had long been excluded. Indeed, this Court did not announce until January 21, 1975, six days before petitioner's trial began, its decision in Taylor v. Louisiana, 419 U.S. 522 (1975) which first established that the systematic excusal of women from jury service under an "opt-in" jury statute "deprives a criminal defendant of his Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community." 419 U.S. at 535-36. Both Garland Byrd and Floyd Buford, petitioner's trial counsel, submitted affidavits stating that they had absolutely no opportunity to obtain or read Taylor in the six days between its announcement and petitioner's trial, and that they of course could not realize its possible use to petitioner. (See Nov. 1982 St. Hab. Tr., Pet. Ex. 4 & 5, at 240-44).

Taylor expressly struck down, moreover, not the "opt-out" statutes such as that enforced during petitioner's trial, but more restrictive "opt-in" statutes, under which women became eligible for jury service only if they affirmatively sought inclusion in the jury pool. The "opt-out" statutes were not expressly held unconstitutional until this Court decided Duren v. Missouri, 439 U. S. 357 (1979), long after petitioner's direct appeal and state habeas proceedings had been completed.

Furthermore, at the time petitioner began state habeas corpus proceedings in October of 1976, not only did he, as an indigent, have no access to the factual predicate of a jury claim -- statistical evidence of the jury composition in Bibb County -- but the legal path to the assertion of such a claim appeared to be blocked by Georgia's habeas corpus statute, which provided:

> "Any persons imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States . . . may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently."

Ga. Code Ann. §50-127(1)(1979)(emphasis added). Not until the state courts chose to overlook this statute in 1978 and entertain, on its merits, the jury claim of petitioner's co-defendant did it become clear that §50-127(1) would not necessarily have barred petitioner from asserting a similar claim.

Petitioner alleged in his successive federal petition that he "himself never waived this claim; he was without any legal training which would alert him to its availability and was never informed of it by his lawyers, and made no decision

to forego or withhold its assertion at any time." (Fed.Hab. Petition, §17).

Petitioner pointed not only to the foregoing "causes" for the failure of his counsel to raise the jury claim; he set forth evidence of clear "prejudice" as well. As part of his submission to the state courts on his successive petition, petitioner annexed the testimony of Dr. John Curtis, an associate professor of sociology and anthropology at Valdosta State College in Valdosta, Georgia. Dr. Curtis testified that he had conducted four studies of attitudes toward the death penalty in the State of Georgia, and that women tended to be more opposed to capital punishment than did men. Dr. Curtis testified that based upon his research and that of other researchers, the greater number of women on a capital jury, the greater would be the likelihood of a life sentence rather than a death sentence. (St. Hab. Pet., Ex. F, at 14f).

In the District Court, petitioner solicited, both orally and in writing, an evidentiary hearing on the issues of "cause" and "prejudice" under Wainwright v. Sykes, 433 U.S. 72 (1977). The District Court denied any hearing, finding the jury issue foreclosed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner first became aware of a possible claim of prosecutorial misconduct in early May of 1982, when his counsel was informed that the former District Attorney who had prosecuted him, Fred Hasty, had acknowledged a pretrial arrangement with the State's key witness, John Maree. Petitioner obtained an affidavit from Mr. Hasty on May 25, 1982 and one month later, on June 25, 1982, filed a successive state habeas corpus petition in the Superior Court of Butts County asserting that claim. (St. Hab. Petition, ¶¶ 15-20). The Superior Court dismissed the petition in two one-page, unpublished orders filed the same day. (Copies of those two orders

are annexed as Appendix B.) On September 16, 1982, the Supreme Court of Georgia, in an unpublished order, remanded the case to the Superior Court "for an evidentiary hearing on the issue raised in the Petition for Habeas Corpus filed in the trial court on June 25, 1982." (A copy of this order is annexed as Appendix C.) The Superior Court, after a hearing on the issue of waiver, dismissed the prosecutorial misconduct claim on November 16, 1982, on the ground that "Petitioner has failed to establish that the first ground raised by means of this second habeas corpus petition could not reasonably have been raised in the original habeas corpus petition." (Order of November 16, 1982, annexed as Appendix D, at 5d).

On appeal, the Supreme Court of Georgia reversed and remanded a second time, holding that

> "since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense . . . We therefore hold that Smith has . . . shown grounds for relief which could not reasonably have been raised in his original habeas petition."

Smith v. Zant, 250 Ga. 645, 652, 301 S.E.2d 32, 37 (1983)(A copy of this opinion is annexed as Appendix E.) During petitioner's evidentiary hearing held on May 10 and June 13, 1983, evidence was introduced that not only suggested a pretrial promise to John Maree of a life sentence in exchange for his testimony, but also of a threat made by District Attorney Hasty that Maree would be prosecuted first among the co-indictees and might be given a death sentence if he would not testify against petitioner. (See St. Hab. I, Resp. Ex. 1; id., at 51). Petitioner urged at the close of the state hearings that this testimony of a pretrial threat established a violation of Giglio v. United States, supra, independently of any evidence concerning a pretrial promise. (St. Hab. II, 147-50).

In an unpublished order entered August 5, 1983,

(a copy of which is annexed as Appendix F), the Superior Court found "that state's witness Maree had made no agreement with the state in exchange for his testimony against the Petitioner, except protection for his family and himself because of threats," App. F, at 10f, and therefore "that Petitioner was not deprived of his right to a fair trial under due process principles," id. at 11f. The Superior Court did not directly address the threat-as-inducement branch of petitioner's Giglio's claim.

The Supreme Court of Georgia denied petitioner's application for a certificate of probable cause in a brief, unpublished per curiam opinion entered August 16, 1983. (A copy of that order is annexed as Appendix G.)

The following day, August 17, 1983, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Macon Division, asserting both branches of his Giglio claim (Fed. Hab. Petition ¶¶ 13, 18-29). Petitioner sought a further evidentiary hearing on these claims, both in oral argument to the District Court (Fed. Hab. Tr. 69-77) and in a Motion for an Evidentiary Hearing, filed August 18, 1983.

In an unpublished order entered August 19, 1983, (a copy of which is annexed as Appendix H), the District Court found presumptively correct under 28 U.S.C. §2254(d) the state court's finding that there had been no pretrial promise to state's witness John Maree. (App. H, 4h-6h,) Addressing the second branch of petitioner's Giglio claim, the District Court misread the state habeas record, finding that "the threatening conversation occurred after petitioner's trial," id. at 7h.

On appeal, the Eleventh Circuit affirmed by a divided vote. The majority held that "[t]he state court's finding that there was no agreement between Maree and the prosecution is 'fairly supported by the record.' See 28 U.S.C. §2254(d)(8)," App. A, at 11a, and that "the state habeas court afforded

petitioner a full and fair hearing on this contention," id. at 14a. Turning to petitioner's alternative Giglio claim, the majority held that "[n]othing stated to Maree was concealed from the jury. Maree's testimony at trial made it abundantly clear that he was subject to prosecution," id., at 14a.

The dissent would have "remand[ed the first Giglio claim] to the district court for an evidentiary hearing," id., at 34a, observing that "[d]ue to the inconsistency between Hasty's testimony and his deposition and affidavit, the state court finding of no pretrial agreement is not fairly supported by the record," id., at 39a. The dissent also found petitioner's second Giglio claim to be persuasive:

> "The state record as a whole clearly shows that Hasty communicated to Maree the idea that he would be tried first and the death penalty sought unless he testified against Smith. This understanding, however, was not disclosed to Smith's trial jury. Instead, Hasty intentionally misled the jury as to Maree's credibility. This is a Giglio violation."

Id., at 40a.

2. Petitioner challenged the composition of his grand and traverse juries in his successive state habeas petition (St. Hab. Petition, ¶¶ 33-41), alleging that because of Georgia's opt-out statutes, his jury pool grossly underrepresented women. As noted above, the Superior Court summarily denied relief. The Supreme Court of Georgia subsequently remanded. On remand, the Superior Court held that

> "[p]retermitting the question of whether Petitioner has waived his right to present the jury issue by failing to make a timely challenge to the array of the grand and traverse jury, as required by Georgia law, this Court finds that Petitioner has failed to show that this issue reasonably could not have been raised in his previous habeas corpus action."

App. D, 6d-7d.

On appeal, the Supreme Court of Georgia affirmed, noting that "Petitioner has not shown grounds for raising this issue in his second habeas petition," App. E, at 3e.

In his federal habeas petition, petitioner again asserted his jury claim (Fed. Hab. Petition ¶¶ 16-17, 41-48), and moved for an evidentiary hearing, both on the merits of the claim and on the State's claims that petitioner had waived or deliberately bypassed the issue. Petitioner asserted that the fundamental change in the law worked by Taylor v. Louisiana, decided less than a week before his trial, and the ruling in Duren v. Missouri, which came four years after his trial, sufficed to establish "cause" (id. ¶¶ 44-45), and noted that the difference between the attitudes of men and women toward the death penalty was sufficient to establish "actual prejudice," (id. ¶¶ 47-48). The District Court denied an evidentiary hearing and denied relief, holding that "[t]he reason[] given by the Supreme Court of Georgia for [that issue] . . . -- the alleged unconstitutional composition of the grand and petit jury lists . . . -- now being foreclosed, are in all respects valid and supported by decisions of the Supreme Court . . . ." (App. H, at 2h).

On appeal, petitioner reasserted his "cause" and "prejudice" arguments. He also contended that Wainwright v. Sykes, supra, 433 U.S. at 91, does "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice," (Pet. Mem. of Law, at 52), and that this was a case in which a "miscarriage of justice" would otherwise result. The majority affirmed, however, holding that petitioner "has not established 'cause and prejudice' for his failure to raise the allegation of illegal jury composition until his second, successive state habeas corpus petition," App. A, at 2a. The majority rejected

any idea that trial "counsel's lack of awareness of the Taylor decision at the time of trial . . . establish[es] 'cause,'" id. at 24a, or that in condemning opt-out jury statutes in 1979 in Duren v. Missouri, 439 U.S. 357 (1979), this Court "made such a fundamental change in the law that it established 'cause' for a failure to raise the issue at Smith's trial in 1975," id. at 26a. The majority denied that petitioner could establish 'actual prejudice' simply by showing that his jury was in fact unconstitutionally composed. Id. at 27a. The majority also stated its failure to see "how application of the procedural default rule to Smith could result in a 'miscarriage of justice,'" id. at 29a.

The dissent reluctantly concluded that the Court of Appeal was barred under this Court's waiver principles from reaching the merits:

> [Petitioner's co-indictee], the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Her lawyers timely raised this constitutional objection. They won; she lives.
>
> John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation issues, even under principles of "manifest injustice."

REASONS FOR GRANTING THE WRIT

Petitioner, a death-sentenced Georgia inmate, is well aware that he comes before this Court on a successive habeas corpus petition, and that the Court has already denied his earlier petitions, raising other constitutional issues. Especially after the Court's observation this past Term in Barefoot v. Estelle, __U.S. __, 51 U.S.L.W. 5189 (U.S. June 28, 1983)(No. 82--6080), that successive petitions may "' . . . involve the dang r that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic,'" id., at 5193, it is clearly incumbent upon any capital defendant who hopes to claim the Court's attention to present real and substantial grounds on any successive application to this Court.

Petitioner, despite his prior applications, meets this Barefoot standard. His claim of prosecutorial misconduct under Giglio v. United States, 405 U.S. 150 (1972), is for federal purposes a "new" and substantial one, for it could not have been asserted, as the Georgia Supreme Court acknowledged, until the former District Attorney who prosecuted petitioner first came forward to admit his misconduct. Though prior to that time, petitioner had sought review in this Court on other claims, he had no knowledge of promises or threats that might have induced the testimony of the key state witness against him.

In short, due to the State's misconduct, through no fault of his own, this petition constitutes petitioner's first opportunity to present his Giglio issue to this Court. On its merits, the question presented is a substantial one, and the Court should grant certiorari to review it.

Petitioner's second claim stands on a somewhat different footing; it raises the question of when, and under what circumstances, the inadvertent failure of counsel for a state prisoner to comply with a state procedural rule should be overlooked, and the merits of a plainly meritorious constitutional claim heard on grounds of "manifest injustice."

The existence of a "manifest injustice" exception to Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), has been adverted to by the Court in Sykes and Engle, and in prior decisions of the Court as well. The scope of the exception, however, has yet to be defined. This petition presents an appropriate occasion to address that important federal question.

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PROSECUTORIAL THREATS AGAINST A KEY EYEWITNESS -- NO LESS THAN PROMISES -- MUST BE DISCLOSED ON CROSS-EXAMINATION UNDER GIGLIO v. UNITED STATES, 405 U.S. 150 (1972) AND NAPUE v. ILLINOIS, 360 U.S. 264 (1959), IF THEY CONSTITUTED A POSSIBLE INDUCEMENT FOR THE WITNESS'S TESTIMONY

"As long ago as Mooney v. Holohan, 294 U.S. 103," Chief Justice Burger has observed, "this Court made clear that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153 (1972). The Court's concern to avoid "a corruption of the truth-seeking function of the trial process," United States v. Agurs, 427 U.S. 97, 104 (1976), has led beyond a prohibition of direct perjury concerning facts of the crime to a proscription of false or misleading testimony on facts relevant to the credibility of a key State witness. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence

affecting credibility falls within this general rule," Giglio v. United States, supra, 405 U.S. at 154.

The principal focus of the Court's prior "credibility" cases has been upon the nondisclosure of a government promise of favorable treatment, see, e.g., Napue v. Illinois, supra, 360 U.S. at 265 ("State's attorney had in fact promised . . . [a key witness] consideration"); Giglio v. United States, supra, 405 U.S. at 150-151 ("Government had failed to disclose an alleged promise made to its key witness"). Yet petitioner maintains that it is the presence of an undisclosed inducement for testimony, and not the form of the inducement -- whether promise or threat -- that should trigger disclosure to a jury. "[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend," Napue v. Illinois, supra, 360 U.S. at 269 (emphasis added).

In this case, petitioner has alleged that key witness Maree testified under the inducement both of a promise of life imprisonment, and of a specific threat of initial prosecution and a likely death sentence unless he testified against petitioner. A majority of the Court of Appeals, faced with sharply conflicting evidence, rejected petitioner's claim that a pretrial promise had been made, relying, under Sumner v. Mata, 449 U.S. 539 (1981), upon the factfindings made by the state habeas court.

However, the state court never addressed petitioner's Giglio claim based upon the undisputed record evidence that John Maree had been threatened prior to giving his testimony. The District Court, moreover, misreading the record, believed that this threat had come only after petitioner's trial, and therefore never resolved this claim.

The Court of Appeals did reach and reject the claim, concluding that "[n]othing stated to Maree was concealed from the jury," App. A, at 14a, since "Maree's

testimony at trial made it abundantly clear that he was subject to prosecution," id. Yet the key fact, never disclosed to petitioner's jury, was not that Maree was subject to prosecution, as is every criminal defendant, but that the District Attorney had explicitly told him that he would be prosecuted first, with a death sentence likely, if he did not testify, but that the disposition of his case would remain open if he did testify.

The misrepresentation imparted to petitioner's jury thus began when Maree, on cross-examination, stated: "The only thing that was promised to me was protection for my family and myself." (Trial Tr. at 370). In fact, Maree knew that if he had not testified against petitioner, he would have been tried first; his cooperation was induced by Fred Hasty's agreement to leave the disposition of Maree's case open until after petitioner's trial. Although not as clearcut as a hard-and-fast promise, "[o]ne can hardly imagine a more compelling fact that the jury should have had in order to properly evaluate whether a witness of doubtful credibility was in fact being credible in his trial testimony," United States v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977), since it gave Maree the greatest possible incentive to testify in a manner detrimental to petitioner and pleasing to the District Attorney.

Maree furthered the misimpression his testimony gave to the jury as defense counsel pressed him on cross-examination:

> "Q: How about in respect to your liberties, your freedom?
>
> A: Nothing has ever been said of that."

Id. In truth, Maree had been told by the District Attorney that a death sentence -- the ultimate deprivation of liberty -- "most likely" faced him unless he testified for the State. The fact that this testimony may not have been technically perjurous, of course, is not decisive. This Court has condemned

"testimony [that], taken as a whole, gave the jury [a] false impression," Alcorta v. Texas, 355 U.S. 28, 31 (1957), even if not literally false. The jury's impression that Maree was testifying without specific inducement was further heightened by Hasty's own closing argument, in which he assured the jury: "As District Attorney of this Circuit I tell you that those other two defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder" (St. Hab. I, Pet. Ex. 10, at 165-66). The impression deliberately conveyed to the jury was that Fred Hasty intended to prosecute both Rebecca Machetti and John Maree just as petitioner was being prosecuted -- brought before a jury to be tried for murder, and if convicted, to face a death sentence. Yet Fred Hasty has since acknowledged that "earlier in my mind, I had known that if [Maree] testified that I was going to make a recommendation of concurrent life sentences," (St. Hab. I, 77-78). Thus Hasty knew to a certainty that Maree would never be "tried" for murder, since Hasty himself fully intended, even as he made his closing argument to petitioner's jury, to offer him a plea to life imprisonment.

Hasty's purported speculations on Maree's motives for testifying -- "you have to understand in his testimony that he is hoping to save himself from the electric chair. It is the human reaction. It is natural for him to hope that, but he told you, and I can tell you, there have been no promises," (May 10, 1983 Hearing, Pet. Ex. 10, at 166) -- were also misleading and contrived. In truth, while no explicit promise had been made, Hasty knew that Maree's testimony had been induced by far more than a "natural" human hope, but by the sure and certain knowledge imparted to him directly by the District Attorney that if he would not testify, he would be tried first, and

perhaps face a death sentence.[4/]

It is these deliberately orchestrated misimpressions, petitioner submits, that constitute a Giglio violation in this case. Petitioner's jury was entitled to full *knowledge of* the specific threats and inducements under which Maree testified. In conflict with the Eleventh Circuit's holding in this case, the Fourth Circuit has expressly held that, under Giglio, it perceives "no difference between concealment of a promise of leniency and concealment of a threat to prosecute." United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976). This Court implied as much in its consideration of an affidavit filed by a United States Attorney in Giglio:

> The United States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.

405 U.S. at 153. Yet the Giglio decision did not turn on this threat, since the Court found an express promise had been made

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4/ The Court of Appeals majority stressed that "common sense would lead any juror to th[e] conclusion" that Maree might be hoping for leniency. (App. A, at 7a.) Yet, the prosecutor still had a duty to disclose what he knew to be the basis for that hope -- and the consequences Maree had to fear if he failed to cooperate. This Court refused to accept anything less in Napue v. Illinois, 350 U.S. 264 (1959), saying "we do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one." 360 U.S. at 270. Nor is petitioner's due process right to have his jury informed of the incentives under which Maree was offering his testimony, contingent on what Maree himself may have thought then, or claims now, his real motives were. See Boone v. Paderick, 541 F.2d 447, 450 (4th Cir. 1976).

by another government attorney. Id. Although the Court noted in passing that "[t]he Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency," id., at 153 n.4, the Court did not reach the issue of whether such a threat must necessarily be disclosed under Giglio.

This case squarely presents that question. Here, the prosecutor went far out of his way to imply to the jury that a key witness had testified with no more inducement than his own uncounselled concern for his welfare. In truth, the prosecutor had clearly and expressly spelled out to the witness and his counsel the penalty for noncooperation, and had deliberately left open the prospect of favorable treatment if Maree agreed to cooperate. This Court has been vigilant in the past to apply the Due Process Clause so as to guarantee that false or misleading testimony does not distort the factfinding process of a criminal trial. Granting certiorari here to determine whether prosecutorial threats must be disclosed upon cross-examination by defense counsel would further that end, and would clarify an important area of the criminal law.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE REFUSAL TO ADJUDICATE THE MERITS OF PETITIONER'S ADMITTEDLY VALID CHALLENGE TO THE COMPOSITION OF HIS TRIAL JURY -- IN DEFERENCE TO A STATE PROCEDURAL RULE NOT UNIFORMLY APPLIED -- RESULTS IN "MANIFEST INJUSTICE" UNDER THE STANDARD OF WAINWRIGHT v. SYKES, 433 U.S. 72 (1977)

This Court, in a series of decisions rendered during the past decade, has established a policy of deference to state contemporaneous objection rules in criminal cases, declining in most instances to entertain the federal constitutional claims of state prisoners who have not complied with state procedural rules, absent a showing of "cause" and "actual prejudice." See Davis v. United States, 411 U.S. 232 (1973); Francis v. Henderson, 425 U.S. 536 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982). These cases have clearly not denied federal power or jurisdiction to entertain such claims. "The issue . . . goes rather to the appropriate exercise of that power. This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." Francis v. Henderson, supra, 425 U.S. at 539.

This development in the law of habeas practice has been explained as useful to serve important policy objectives in a federal system: (i) to make "the record . . . with respect to the constitutional claim when the recollections of witnesses are freshest," Wainwright v. Sykes, supra, 433 U.S. at 88; (ii) to encourage pretrial ruling on evidentiary issues; and (iii) to avoid "sandbagging" by defense lawyers. Id. at 88-89. In fashioning a rule requiring compliance with state procedural rules, absent a showing of "cause" and "prejudice," the Court has expressed confidence that

> "the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."

Wainwright v. Sykes, supra, 433 U.S. at 91; accord, Engle v. Isaac, supra, 456 U.S. at 128-29 n.33.

Significantly, however, the Court has several times suggested that "if the constitutional issue is sufficiently grave," Wainwright v. Sykes, supra, 433 U.S. at 95 (Stevens, J. concurring), or if the "prejudice [is] so great" under "the facts of [a] . . . case[]," Engle v. Isaac, supra, 456 U.S. at 134 n.43, these requirements of comity should not bar federal adjudication of an important constitutional claim.

This case presents the Court with a compelling opportunity to define and to apply that "manifest injustice" standard. The substantive merit of petitioner's jury claim is not in doubt; the Eleventh Circuit, acting on an identical claim asserted by petitioner's co-indictee, has struck down as unconstitutionally comprised the very jury pool from which his jury was selected. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, __U.S. __, 74 L.Ed.2d 978 (1983). The co-indictee's claim was heard and adjudicated in federal court not because her trial attorneys asserted that claim at trial, in timely compliance with state procedures, but solely because the State chose to ignore its own procedural rules and permit her to raise her jury claim, in untimely fashion, during state habeas proceedings in 1978. When petitioner sought to assert this identical claim in his successive state habeas corpus proceeding, however, the State chose to invoke those same rules to bar his claim. The result is a difference in treatment of two identical capital cases indefensible as a matter of comity or of constitutional law.

As this Court observed in Patterson v. Alabama, viewing a similarly untimely jury challenge, "it is always hazardous to apply a judicial ruling, especially in a matter of procedure, to a serious situation which was not in contemplation when the ruling was made." 294 U.S. 600, 607 (1934). "In appropriate cases [waiver] . . . principles must yield to the imperative of a fundamentally unjust incarceration." Engle v. Isaac, supra, 456 U.S. at 135. Surely where there is a legal and moral certainty that petitioner's death sentence represents the verdict of an unconstitutionally comprised jury, the basic equitable principles at the core of the habeas corpus writ should outweigh the concerns for compliance with state procedural requirements. At a minimum, petitioner was entitled to a full hearing -- which he timely sought, but which the District Court denied him -- on the issue of "cause" and "actual prejudice."

The Court's disposition of an untimely jury challenge in another capital case, Williams v. Georgia, 349 U.S. 375 (1955), is instructive. Williams had failed to make a timely challenge to the systematic exclusion of blacks during his Fulton County trial. Two months later, the Court, in Avery v. Georgia, 345 U.S. 359 (1953), found Fulton County jury practices discriminatory in another Fulton County case. The State admitted that, in light of Avery, a new trial would be required but for the failure of Williams to challenge the jury array, but it relied upon that procedural waiver to deny relief. The Court rejected the proposition that a prisoner should go to his death convicted by an unconstitutionally impaneled jury. Williams was remanded for two reasons: first, because a life was at stake; second, because of an intervening change in the law. In so remanding the Court expressly relied on the Patterson requirement that the Court "consider any change, either in fact or in law, which has supervened since the judgment was entered." 294 U.S. at 607.

Petitioner's claim should be remanded and heard for the same reasons: his life is at stake, and the Duren and Machetti decisions are intervening changes in the law hich establish that petitioner has been deprived of his constitutional rights. Faced with a punishment of death, the federal courts should tip the balance to redress an indisputable constitutional error, not to enforce state procedural rules.

This is particularly true when the State itself ignored those rules and allowed petitioner's co-indictee to assert a jury challenge in state habeas proceedings although she failed to raise the claim at trial or on direct appeal. "The Court has long recognized that the Wainwright v. Sykes standard need not be met where a State has declined to enforce its own contemporaneous-objection rule. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 148-154 (1979); Wainwright v. Sykes, 433 U.S. at 87; Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976)." United States v. Frady, supra, 456 U.S. at 177 (Blackmun, J., concurring in judgment). See also Henry v. Mississippi, 379 U.S. 443, 447 (1963).

Moreover, to permit petitioner to die, though convicted and sentenced by a jury from the same unconstitutional jury pool which gave his co-indictee a new trial, would reinstate in Georgia the scheme of death sentencing condemned by Furman, in which "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (White, J., concurring). No court since Furman has held the Eighth Amendment can tolerate such a result. That question -- and the Sykes issue here -- is clearly substantial enough to warrant plenary review.

CONCLUSION

The petition for certiorari should be granted.

Dated: October 3, 1983

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

NO. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN ELDON SMITH,

Petitioner,

-against-

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I se ved the annexed Petition for Certiorari on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

All parties required to be served have been served.

Done this 3rd day of October, 1983.

JOHN CHARLES BOGER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-8611

PUBLISH

JOHN ELDON SMITH,

Petitioner-Appellant,

versus

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(September 9, 1983)

Before RONEY, HILL and HATCHETT, Circuit Judges.

RONEY and HILL, Circuit Judges:

Joseph Ronald Akins and his wife of twenty days, Juanita Knight Akins, were killed in a secluded area of a new housing development in Bibb County, Georgia, on August 31, 1974, by shotgun blasts fired at close range. Petitioner, John Eldon Smith, also known as Tony Machetti, charged with firing the shotgun, was convicted of murder and sentenced to death.

Briefly, the evidence was that petitioner and his wife, Rebecca Akins Smith Machetti, together with John Maree, plotted to kill Akins, a former husband of Rebecca's and the father of her three children, in order to collect his life insurance proceeds. John Maree testified that he and petitioner lured Akins to the area of the crime on the pretense of installing a television antenna. When Akins appeared with his wife, petitioner shot them both.

Before this Court is the appeal from a denial of a second federal habeas corpus petition that asserted three grounds for relief: first, John Maree had a pretrial agreement or understanding not revealed to the jury so that the trial was unconstitutional under Giglio v. United States, 405 U.S. 150 (1972); second, the Georgia death statute is applied in an

unconstitutional, arbitrary, and discriminatory way; and third, the underrepresentation of women made the jury that convicted him unconstitutional under Taylor v. Louisiana, 419 U.S. 522 (1975).

We affirm the denial of habeas corpus relief holding first, the Giglio claim, although not asserted in the prior federal habeas corpus proceeding, was resolved by a state court's findings of fact that there was no understanding or agreement that should have been revealed to the jury; second, that defendant had a full opportunity to litigate and did litigate in his prior habeas corpus proceeding the issue concerning the arbitrary and discriminatory application of Georgia's death penalty to petitioner, so that the attempt to relitigate here is a clear abuse of the writ; and third, the defendant waived his right to object to the jury by failing to assert the issue at trial, on appeal, or on his first habeas corpus proceeding.

Petitioner's execution was scheduled for August 25, 1983. A notice of appeal was filed in this Court on Monday, August 22, from a denial of the relief by the district court entered on Friday, August 19. A motion for stay of execution was simultaneously filed, along with a motion for certificate of probable cause, denied by the district court.

Following the procedures indicated by Barefoot v. Estelle, _____ U.S. _____, 103 S.Ct. 3383 (1983), this Court gave proper notice that the Court would consider the merits as well as the

pending motion and heard two and one-half hours of oral argument on Tuesday, August 23. The parties cooperated by filing excellent briefs and thoroughly arguing all issues raised in this appeal. The Court entered a stay, in order to more thoroughly examine the issues presented, and called for additional briefs to be filed by August 29. Supreme Court Justice Powell refused to vacate the stay. Our decision here reflects the full consideration of the merits of the case based on the record from the trial and both habeas corpus proceedings, voluminous briefing at the trial and appellate stage, extensive oral argument, and the Court's independent research on the legal issues involved.

To understand our decision, insofar as it relates to the abuse of the writ and the waiver issues, it is helpful to review a chronology of the prior proceedings in this case:

Jan. 30, 1975	Petitioner convicted.
Feb. 1975	Rebecca Smith Machetti convicted.
Jan. 6, 1976	Conviction & sentences aff'd - Smith v. State, 236 Ga. 12, 222 S.Ed.2d 308 (1976).1/
July 6, 1976	Cert. denied, Smith v. Georgia, 428 U.S. 910 (1976).
Oct. 4, 1976	Petition for rehearing denied, Smith v. Georgia, 429 U.S. 874 (1976).
Oct. 22, 1976	Petition for Writ of Habeas Corpus - Georgia Superior Court
Mar. 16, 1977	Petition dismissed (unpublished order)
Oct. 18, 1977	Affirmed order dismissing, Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977).2/

June 5, 1978	Cert. denied, Smith v. Hopper, 436 U.S. 950 (1978).
Oct. 2, 1978	Petition for rehearing denied, Smith v. Hopper, 439 U.S. 884 (1978).
Feb. 21, 1979	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Sept. 9, 1980	U.S. Magistrate recommended denial of all relief.
Nov. 26, 1980	District court denied relief (unreported order and judgment).
Nov. 2, 1981	This Court affirmed, Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981).[2]
Mar. 29, 1982	Opinion Modified on Rehearing, 671 F.2d 858 (5th Cir. Unit B 1982).
Oct. 5, 1982	Cert. denied, Smith v. Balkcom, 103 S.Ct. 181 (1982).
June 25, 1982	Second Petition for Writ of Habeas Corpus filed in Georgia Superior Court.
	Georgia Superior Court dismissed immediately without consideration of the merits.
Sept.16, 1982	Georgia Supreme Court remanded appeal "for an evidentiary hearing on the issues raised in the Petition."
Nov. 15, 1982	Superior Court on remand (after brief hearing on waiver issues) denied evidentiary hearing on merits and dismissed.
Mar. 1, 1983	Georgia Supreme Court reversed and remanded case again for evidentiary hearing on prosecutorial claim of misconduct. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983).
May 10, 1983 June 10, 1983	Evidentiary hearings before Superior Court.
Aug. 5, 1983	Superior Court's order denying relief.

Aug. 16, 1983	Georgia Supreme Court denied application for CPC.
Aug. 17, 1983	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Aug. 17, 1983	Oral Argument before District Court.
Aug. 18, 1983	Petitioner's motion for an evidentiary hearing.
Aug. 19, 1983	Order denying motion. Order dismissing petition, denying CPC, denying IFP and denying stay of execution pending appeal.
Aug. 19, 1983	Notice of Appeal (USCA, 11th Cir.).
Aug. 22, 1983	Application for CPC, IFP and certificate of good faith and application for stay of execution.
Aug. 23, 1983	Oral Argument and Order granting CPC, IFP, and stay of execution.
Aug. 24, 1983	Motion to Vacate Stay applied to Justice Powell.
Aug. 24, 1983	Justice Powell's Order declining to vacate stay.
Aug. 25, 1983	Court's letter to counsel to file other material by August 29.

In these appeals and petitions, a total of 28 jurists on seven separate state and federal courts, some on several occasions (the Supreme Court of the United States has been petitioned four times, the Georgia Supreme Court five), have considered Smith's claims. He has sought procedural devices (stays of execution and full hearings) to insure that his claims be fully developed and

considered as well as relief on their merits. He has been provided most of the procedural protections sought. No court has found merit in any of his claims.

I. Alleged Giglio Violation.

The petitioner did not raise the claimed Giglio violation until his second state habeas corpus petition. At the insistence of the Supreme Court of Georgia on its second remand of that petition to the state habeas corpus judge, a hearing was held on petitioner's claim that the prosecution failed to correct the false testimony of John Maree, an accomplice and eyewitness who testified against Smith at the latter's trial, that Maree had no plea agreement with the state. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983). Prosecutorial suppression of an agreement with or promise to a material witness in exchange for that witness' testimony violates a criminal defendant's due process rights. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony.

Maree testified on cross examination that he had never received any promises in exchange for his testimony other than "protection for my family and myself." Smith alleges that Maree had received a promise of a life sentence in exchange for testimony against petitioner and that the prosecutor concealed this promise from the jury.

On remand, the issue before the state habeas court centered upon the existence, vel non, of such a promise to, or

agreement with, witness Maree. After what we find to have been a full and fair hearing, the state judge found, as a fact, that there had been no such promise or agreement.

The hearing was extensive. While the issue was first joined upon exhibits of sworn statements of Fred Hasty, the District Attorney who had prosecuted petitioner and a contradictory affidavit of witness Maree, it was not confined to that. Hasty was called and testified, in person, before the court. Indeed, every person in life who was suggested as having knowledge of the alleged deal appeared, in person, and gave testimony on direct and cross examination.

Hasty denied that he had extended any promise to, or made any agreement with, witness Maree. He acknowledged that he had given prior contradictory sworn statements. In explaining the contradiction between his live testimony at the state habeas hearing and both the sworn statement in a deposition he gave in Becky Machetti's case and an affidavit he gave to Millard Farmer on behalf of appellant's counsel, Hasty testified that he thought the latter statements were true when he gave those statements, but after reviewing his file and the transcript of appellant's trial, Hasty realized that these statements were not true. Transcript of May 10, 1983 hearing at 88-89, 93. Hasty explained that when he gave those statements, he had not reviewed his file or the transcript. Transcript of May 10, 1983 hearing at 100-101. Hasty testified that at the time of Smith's trial, he knew what he was going to do with reference to the case pending against

John Maree, if Maree testified, but did not discuss this with Mr. Sparks. Transcript of May 10, 1983 hearing at 77.

The sworn testimony of every live witness who testified at the state habeas hearing contradicts Hasty's two affidavits. Willis Sparks, who represented Maree on the murder charge in 1974, testified that he had asked then District Attorney Hasty "point-blank" what Maree would receive from the prosecution in return for his testimony. Sparks swore that Hasty had steadfastly replied that the prosecutor would make no agreement with a co-defendant before trial because that was not his practice. Sparks further testified that Assistant District Attorney Thompson had never made any promise to Maree and that no one from either the Bibb County district attorney's office or sheriff's department had ever made any promises to Sparks as Maree's attorney. Sparks testified that he had recommended to Maree that the latter testify because Maree had already made a valid confession. Sparks had also noted that the confession had been corroborated by Maree's palm print found in the victim's car and that the state could and might well seek the death penalty against Maree.4/

Bibb County Sheriff Ray Wilkes stated that he was Chief Deputy of Bibb County when petitioner was tried and that no member of the sheriff's office made any promises to Maree.

Although the state habeas judge had before him the affidavit of Maree, then serving a life sentence, petitioner urged that Maree should appear and testify under cross examination. The state offered to produce Maree and the hearing was adjourned

to a date for his appearance. On June 13, 1983, one month after the initial hearing, he was produced, sworn, and testified. His testimoney was unequivocal. Maree testified that "at the first trial, there was no question about testifying. I didn't have any real conversation regarding any kind of a deal whatsoever." Transcript of June 13, 1983 hearing at 10. Maree unequivocally stated that he had had no discussions with Hasty concerning a life sentence in exchange for his testimony at Smith's murder trial. Id. Maree also stated at the state habeas hearing that he had testified at Smith's trial on advice of his counsel Sparks who had concluded that it was in Maree's best interest, under all the circumstances, to give full truthful testimony.

If the state habeas court afforded petitioner a full and fair hearing, we, as a federal habeas court, must apply a presumption of correctness to the state court's written factual findings. Sumner v. Mata, 449 U.S. 539 (1981); 28 U.S.C. §2254 (d). Petitioner must rebut this presumption by establishing by convincing evidence that the state court's findings are erroneous. Sumner v. Mata, 449 U.S. at 546; Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983).

The state court's findings of fact are amply supported by the evidence. Although Hasty's testimony was subject to the impeachment inherent in his prior sworn statements (which as sworn affidavits, constituted evidence of the facts stated in them), the state habeas judge found that there had been no promise made to, or agreement made with, witness Maree. In so finding,

the judge found in accordance with all the sworn testimony taken from all the witnesses who appeared before him. To have found to the contrary would have required a finding that each and every witness who knew the facts had lied in their testimony given at the hearing.

Resolution of conflicts in evidence and credibility issues rests within the province of the state habeas court, provided petitioner has been afforded the opportunity to a full and fair hearing. 28 U.S.C. §2254 (d) does not give federal habeas courts "license to redetermine credibility of witnesses whose demeanor has been observed by the state . . . court, but not by them." Marshall v. Lonberger, 103 S.Ct. 843, 851 (1983). The state court's finding that there was no agreement between Maree and the prosecution is "fairly supported by the record." See 28 U.S.C. §2254 (d) (8). Petitioner has not satisfied his burden of proving by convincing evidence that this finding was erroneous.

Petitioner asserts that the state habeas hearing was not full and fair. He first asserts that the hearing was flawed because, at that hearing, Hasty was represented by private counsel and representatives of the State Bar of Georgia were present. Petitioner's assertions that Hasty had made a "deal" with witness Maree and had abided its concealment at petitioner's trial had attracted the bar's attention. Such conduct might well constitute unethical conduct. Petitioner does not contend that the presence

of the bar investigators or Hasty's counsel prevented petitioner from presenting any evidence or argument or otherwise fully developing his claim.

As we view the record, the impact, if any, of the pendency of state bar proceedings against Hasty aided petitioner. The state habeas court was certainly aware of the presence of the bar investigators. The fact that Hasty was subject to such proceedings would tend to impeach his testimony at the hearing, to petitioner's benefit. The presence of his private counsel, retained in connection with the disciplinary matter, and the presence of the bar representatives presented motivation to Hasty to exonerate himself most dramatically. It would have been material to petitioner's attack upon Hasty's testimony to have proven the coincident disciplinary proceedings. They were shown to the state court more effectively than petitioner could have been expected to prove.

Attorney Millard Farmer, said to have been doing "leg work" for petitioner's attorneys, had taken the affidavit from Hasty offered in support of petitioner's claim. After concluding the second hearing, at which Hasty had denied the correctness of the affidavit and had sworn that he had been assured by Farmer that he would have an opportunity to correct it, the state judge allowed petitioner additional time to produce Farmer as a witness,

live or by deposition. Transcript of June 13, 1983 hearing at 144-45. Petitioner chose, instead, to file Farmer's affidavit.

Petitioner argues that the state habeas hearing was faulty in that he was not allowed to subpoena and inspect the confidential record of the Georgia State Pardon and Parole Board concerning witness Maree. Georgia law provides that these files remain confidential. O.C.G.A. § 42-9-53. It is suggested that such a record might contain some support for the contention that, before petitioner's trial, a promise had been made to Maree. At the district court's direction this file, sealed, was provided to the district judge who examined it in camera. It is a part of the record before us. We have examined it. It offers no support for that proposition.

Petitioner asserts that the state hearing was less than full and fair in that the state court refused to admit testimony from proffered witness Reverend Murphy Davis. This witness offered to state that long after petitioner's trial, Davis had participated in a debate with former Assistant Bibb County District Attorney Donald Thompson as to the propriety, vel non, of the death penalty and that at that debate, Thompson had stated that it was necessary for Maree to be let off with a life sentence in order to obtain evidence against petitioner and Rebecca Machetti. Petitioner offered Davis' testimony to prove the truth of Thompson's statement. Thompson pre-deceased these proceedings. Aside from the insufficiency of what Thompson is alleged to have said to

prove the existence of a pretrial deal with witness Maree, this evidence was offered to prove the truth of the matter therein and constituted inadmissible hearsay. The state judge permitted petitioner to proffer the testimony of Rev. Davis in the form of a direct examination of Davis.

We conclude that the state habeas court afforded petitioner a full and fair hearing on this contention. All witnesses desired by petitioner were produced even where adjournment was required for their production. No admissible evidence offered by petitioner was excluded. The finding that there was not a pretrial agreement or promise to Maree was supported by all the sworn testimony and it was substantial. Absent a deal or promise, there was no Giglio violation arising from the failure of the prosecution to reveal one.

Petitioner alternatively asserts that the prosecution presented a threat against witness Maree and that failure to reveal this threat to the jury violated Giglio v. United States, supra. In pretrial discussions with Maree and his counsel, Sparks, the prosecutor had outlined Maree's position. Maree had confessed to the murders. His confession gave the prosecutor a better case against Maree than the state possessed against Maree's co-indictees. The nature of the crime made the death penalty available.

Nothing stated to Maree was concealed from the jury. Maree's testimony at trial made it abundantly clear that he was subject to prosecution. The jury knew that. No one concealed from the jury that Maree hoped, by testifying, that he might

escape the death penalty. If that was not apparent from Maree's testimony, the prosecutor made it clear to the jury when he said, in closing argument

> I want to tell you one other thing.... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise.

The threatened position of Maree was clear to the jury. He was subject to prosecution on two counts of murder (He was so prosecuted); the district attorney intended to obtain convictions on both counts (He did); Maree was hoping to avoid the death penalty (He did); but no promise had been made to him.

The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir. 1978); see United States v. Meinster, 619 F.2d 1041, 1044-45

(4th Cir. 1980) (Intent of Giglio "is not to punish the prosecutor; rather the primary concern is that the jury not be misled by the prosecution's knowing use of perjured testimony."); United States v. Barham, 595 F.2d 231, 243 (5th Cir. 1979).

In this case Maree's fears and aspirations were clear. The jury was made aware of Maree's situation and could test his credibility taking his threatened posture into consideration. Under the facts of this case, no Giglio violation occurred.

II. Appellant's Contention that Georgia Death Penalty Statute Is Arbitrarily And Discriminatorily Imposed.

In this successive habeas corpus petition, petitioner asserts that the death penalty in Georgia is arbitrarily and discriminatorily imposed. Smith unsuccessfully raised this same claim in his first federal habeas corpus petition. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, _____ U.S., _____, 103 S.Ct. 181 (1982). Appellant admits that the issue raised in this petition is the same claim which was previously decided adversely to him but asserts that he now has additional evidence which he could not have presented the first time this court adjudicated this issue. Alternatively, petitioner contends that this court altered the standard by which we adjudicate claims of discriminatory application of the death penalty in Georgia.

Rule 9(b) of the Rules governing §2254 cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert these grounds in a prior petition constituted an abuse of the writ.

Appellant correctly notes that a denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7 (1963). Rule 9(b) codifies the seminal case of Sanders and preserves existing case law with respect to abuse of the writ. Advisory Committee Note, Rule 9, Rules Governing Section 2254 cases in the United States District Courts (28 U.S.C.A. Foll. §2254); Potts v. Zant, 638 F.2d 727, 739 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981).

> In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal habeas court will adjudicate at least once the claims of a petitioner.

Potts v. Zant, 638 F.2d at 738.

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court held that a federal court may give

> controlling weight . . . to denial of a prior application for federal habeas . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to

> the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. In determining whether the "ends of justice" would be served by readdressing the merits of the same contention as raised in the prior petition, we must look at objective factors, such as whether this was a full and fair hearing with respect to the first petition and whether there has been an intervening change in the law. Id. at 16-17; Potts v. Zant, 638 F.2d at 739.

In the case at bar, Smith concedes that his argument regarding the alleged discriminatory application of Georgia's death penalty statute presents the same claim that was determined adversely to the applicant in the prior adjudication. No party disputes that the prior determination was on the merits. See Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, ____ U.S. ____, 103 S.Ct. 181 (1982). We must therefore determine whether a new adjudication of the merits of petitioner's argument would serve the ends of justice. We conclude that it would not.

Petitioner bears the burden of showing that the ends of justice would be served by a redetermination. Sanders v. United States, 373 U.S. at 17. Appellant has not alleged that the initial hearing on this issue was not full and fair. See id. at

16-17. Smith cannot assert that the denial of the earlier petition constituted plain error. See Bailey v. Oliver, 695 F.2d 1323, 1325-26 (11th Cir. 1983). Petitioner asserts, however, that the panel's modification of its original opinion constituted a change in the law justifying his failure to raise a crucial point by presenting evidence of discriminatory impact. See Sanders v. United States, 373 U.S. at 16-17. This assertion lacks merit.

The modification of our opinion in the earlier adjudication of petitioner's contention, Smith v. Balkcom, 671 F.2d at 859, did not alter the requirement that a petitioner prove intentional discrimination. Our earlier opinion, 660 F.2d 573, 585 (5th Cir. Unit B 1981), implied that the court would never find intentional or purposeful discrimination from circumstantial proof or proof of racially disproportionate impact. The modified opinion acknowledged that under long existing precedent, in certain instances, "statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose." Smith v. Balkcom, 671 F.2d at 859 (citing Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 266 (1977) and Furman v. Georgia, 408 U.S. 238, 389 n.12 (1972) (Burger, C.J., dissenting)). That is the proposition upon which Smith proceeded in his first habeas petition and our opinion worked no change in that proposition. Neither the original panel opinion nor the modification undertook to declare what

evidence would prove purposeful discrimination by a state; they merely pointed up some shortcomings in the evidence petitioner offered to support his claim. There was no remand. The issue having been fully and fairly presented by petitioner in this first habeas petition was finally decided.

Petitioner's attempt to present "new evidence" in his second petition merely seeks to introduce a modified and expanded version of statistics already rejected by this court in adjudicating the merits of the prior petition. In this successive habeas petition, Smith offers additional conclusions said to be drawn from the same records that were available to him when this identical assertion was made and adjudicated by the several courts which passed upon it. To entertain such piecemeal submissions would not serve the ends of justice but would allow prisoners to file nuisance and vexatious petitions. To allow Smith to reassert this claim would allow any unsuccessful habeas petitioner to file additional successive applications by keeping teams of aides at work studying the same data and proffering additional arguments and conclusions derived from and based upon the ongoing study. That is precisely what Rule 9(b) prohibits. Without a further showing of how the ends of justice would be served by considering Smith's reassertion of the same discrimination claim, Rule 9(b) precludes consideration of the merits of petitioner's argument in this successive petition.

III. Constitutionality of Jury.

Smith made no challenge to the jury because of the underrepresentation of women at or before trial. The Georgia procedural rule requires that a defendant's challenge to jury composition be made at or before the time the jury is "put upon him". O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. Smith also failed to raise the jury composition issue on direct appeal to the Georgia Supreme Court, in his initial state habeas corpus action, or in his initial federal habeas corpus petition. Smith's wife, however, while not raising the issue at trial did in her first habeas corpus proceeding challenge the underpresentation of women on the jury under Taylor v. Louisiana, 419 U.S. 522 (1975). Although she failed to obtain state relief, she did succeed in her first federal habeas corpus appeal. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1983). This Court held the Georgia "opt-out" provision for women led to unconstitutional underpresentation of women under Duren v. Missouri, 439 U.S. 357 (1979). Petitioner and his wife were tried within a few weeks of each other in the same county so that the Georgia provision applied to both juries.

The questions before this Court are (1) whether Smith's failure to comply with this state procedural rule constitutes a waiver of his right to challenge the jury composition, and (2) if there was such a waiver, whether Smith is entitled under any theory to be relieved of its preclusive effect.

We hold that Smith has not established "cause and prejudice" for his failure to raise the allegation of illegal jury composition until his second, successive state habeas corpus petition. We affirm the district court's holding that it was prohibited from considering this claim on its merits.

The law is clear that even if a jury is unconstitutional, that alone will not invalidate a conviction and death sentence if the defendant failed to make the proper constitutional challenge. Davis v. United States, 411 U.S. 233 (1973); Huffman v. Wainwright, 651 F.2d 347, 349 (5th Cir. Unit B 1981); Evans v. Maggio, 557 F.2d 430, 432-33 (5th Cir. 1977); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974). A failure to comply with state procedural requirements can be a waiver of the right to assert a constitutional violation. Wainwright v. Sykes, 433 U.S. 72 (1977). A state may restrict the time during which a defendant may raise a constitutional violation. Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). A federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. Francis v. Henderson, 425 U.S. 536, 541-42 (1976).

It is clear from the record, and the parties agree, that Smith made no objection to the jury composition because of underrepresentation of women at or before his trial, and therefore

waived his right to assert the matter under state law.[5/] The question is therefore whether Smith is entitled under any theory to be relieved of his waiver of the claim, and to assert the jury composition claim on this second petition for habeas corpus.

The Supreme Court has held that for a federal court to consider the merits of a defendant's claim, where the defendant has failed to comply with a state contemporaneous objection rule, the defendant must show "cause" for noncompliance with the rule and "actual prejudice." United States v. Frady, 456 U.S. 152 (1982); Wainwright v. Sykes, 433 U.S. 72, 89 (1977); Francis v. Henderson, 425 U.S. 536 (1976).

The requirement in Wainwright v. Sykes, 433 U.S. 72 (1977), that a defendant show "cause" for noncompliance with a state contemporaneous objection rule was designed to eliminate the possibility of "sandbagging" by defense lawyers, and to reduce the possibility that the federal court will decide a constitutional issue without the benefit of the state's views. Sykes, 433 U.S. at 89-90; Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), petition for cert. filed, No. 82-6923 (June 14, 1983). While the Supreme Court has not explicitly defined cause and prejudice, our precedents have stated that "cause" sufficient to excuse a procedural default is designed to avoid a "miscarriage of justice." Ford, 696 F.2d at 817; Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981).

Smith contends that he established "cause" for noncompliance with the state procedural rule because his lawyers were ignorant of recently decided cases. On January 21, 1975, six days before Smith's trial began, the Supreme Court decided Taylor v. Louisiana, 419 U.S. 522 (1975). Taylor held that the constitution requires that a jury be selected from a representative cross-section of the community and that the Louisiana statute which automatically excluded women from jury service unless they filed a written request to be subject to jury service, an "opt-in" statute that led to underrepresentation of women on the jury, was unconstitutional. In Duren v. Missouri, 439 U.S. 357 (1979), decided January 9, 1979, 43 days before Smith filed his first federal habeas corpus petition, the Court held unconstitutional an "opt-out" statute which granted automatic exemption from jury service to any woman requesting it. On June 25, 1982, this Court held unconstitutional Georgia Code Ann. § 59-124 (1965) (repealed 1975), the "opt-out" statute under which Smith's jury was selected in Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).

It was not until after Machetti was decided that Smith sought to litigate the jury composition issue in his second state habeas corpus petition, first in the Superior Court of Butts County and then in the Georgia Supreme Court. Smith v. Zant, 301 S.E.2d 32 (Ga. 1983). The state habeas corpus court applied the state procedural waiver rule and did not consider the issue of alleged

illegal jury composition on the merits. The Supreme Court of Georgia found that Smith had not shown grounds for raising this issue in his second habeas petition. The federal district court held that it was precluded from considering this claim because the state court applied the state procedural rule and did not consider the merits of the claim.

To show cause for his failure to object before the second state habeas corpus petition, Smith has presented affidavits that his trial lawyers were unaware of the Taylor decision at the time of his trial, and he argues that Duren and Machetti were intervening changes in the law which justify his failure to raise the issue until his second state habeas corpus petition.

Smith's argument fails for several reasons. First, counsel's lack of awareness of the Taylor decision at the time of trial does not establish "cause." In Engle v. Isaac, 456 U.S. 107, 134 (1981), the Supreme Court stated:

> Where the basis of a constitutional claim is available, and other defense counsel have preceived and litigated that claim, the demands of comity and finality counsel against labelling unawareness of the objection as cause for procedural default.

See also Dumont v. Estelle, 513 F.2d 793, 798 (5th Cir. 1975) (reliance on state law at the time of trial does not, by itself, constitute cause).

Second, Smith has not established "cause" because of any supervening "change in the law" resulting from Duren v. Missouri, 439 U.S. 357 (1979), or Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, 103 S.Ct. 763 (1983). In Lee v. Missouri, 439 U.S. 461 (1979), the Supreme Court held that the 1979 Duren decision would be retroactively applied to any jury sworn after the 1975 Taylor decision, because Duren did not announce any new standards of constitutional law not evident from Taylor. 439 U.S. at 462. In light of the Supreme Court's explicit statement that the principles of Duren were evident from Taylor, we cannot hold that Duren made such a fundamental change in the law that it established "cause" for a failure to raise the issue at Smith's trial in 1975. The Machetti decision, which declared the Georgia "opt-out" provision unconstitutional, merely applied the Supreme Court's Duren decision striking the Missouri "opt-out" statute.

Smith's jury composition claim thus emanates directly from Taylor v. Louisiana, 419 U.S. 522 (1975). Smith cannot contend that his first opportunity to raise this Taylor issue was in his second state petition for habeas corpus for he cited Taylor in 1977 during the Georgia Supreme Court's review of his first state petition for habeas corpus. Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977). Referring to the Taylor case, Smith claimed his jury did not represent a true cross-section of the community because jurors who would automatically vote against the

death penalty were excused. That Taylor issue was considered by the Georgia Supreme Court, and was litigated in Smith's appeal to this Court from the denial of his first petition for federal habeas corpus relief. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 691 F.2d 858 (5th Cir. Unit B 1982).

Cause and prejudice are sometimes interrelated. Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981). In this case, Smith cannot show "cause" for his procedural default such that a hearing on the merits is necessary to prevent a "miscarriage of justice," nor can he show that "actual prejudice" from the alleged constitutional defect in jury selection affected his conviction.

In Daniel v. Louisiana, 420 U.S. 31 (1975), a criminal defendant had been convicted by a jury chosen in accordance with the Louisiana procedures later held unconstitutional in Taylor. Before Taylor was decided, Daniel had raised a timely motion to quash the petit jury venire, alleging that the jury selection procedures were unconstitutional because they resulted in the systematic exclusion of women from the petit jury venire. His motion was denied by the state court and the Louisiana Supreme Court. The United States Supreme Court was thus faced with the question of whether to apply Taylor to a case involving a jury (1) chosen according to the procedures declared unconstitutional in Taylor, and (2) empaneled prior to the Taylor decision, where there was

no procedural default by the defendant. The Court held that the Taylor decision was "not to be applied, as a matter of federal law, to convictions obtained by juries emplaneled prior to the date of [Taylor]". Daniel, 420 U.S. at 32. The Court stated:

> In Taylor, as in Duncan, our decision did not rest on the premises that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U.S. 57 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.

420 U.S. at 31-32. See also DeStefano v. Woods, 392 U.S. 631 (1968) (Supreme Court decisions holding states could not deny jury trial in serious criminal cases and criminal contempt cases did not apply retroactively to trials before those decisions).

Because the unconstitutional jury composition in Daniel did not necessarily render the defendant's criminal trial unfair, we fail to see how Smith can establish "actual prejudice" which affected his conviction, or how application of the procedural

default rule to Smith's case could result in a "miscarriage of justice." This is especially true where Smith, unlike Daniel, involves a procedural default.

We thus hold that Smith has not shown that the federal court could consider the merits of this claim under the existing legal authorities. The stay of execution hereinbefore granted is vacated. The judgment of the district court is

AFFIRMED.

FOOTNOTES

1/ Although convicted at separate trials, the cases of both petitioner and his wife were consolidated on direct appeal, since, with minor exceptions, the enumerated errors were common to both cases. They were represented by separate attorneys.

The enumerations of error were: (1) the testimony of the accomplice, John Maree, was not corroborated in that there was no independent evidence which connected the defendants with the alleged crimes or the commission thereof, (2) the trial court erred in admitting numerous instances of hearsay testimony where no evidence of a conspiracy existed independent of the testimony of the alleged coconspirator and accomplice, John Maree, (3) the trial court erred in admitting testimony of John Maree as to hearsay statements allegedly made by Rebecca Machetti in violation of defendant's rights to the confrontation clause, and as to petitioner where it was neither shown that Rebecca Machetti would refuse to testify or was otherwise unavailable to testify to the truth of such statements, (4) the trial court erred in admitting the testimony of two officers concerning their interviews with defendants without informing them of their Miranda rights, (5) because there was no valid statute authorizing the death penalty for murder in Georgia, the trial court committed reversible error in imposing the death penalty, (6) reversible error was committed by the trial court in overruling the demurrer to the indictment, (7) the evidence was insufficient to support a finding by the jury of the statutory aggravating circumstance necessary in death penalty cases, (8) the trial court erred in excluding prospective jurors because of their conscientious reservations against imposing the penalty in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), (9) the Georgia death penalty statute does not conform to the requirements of Furman v. Georgia, 408 U.S. 238 (1972), and the death penalty violates the eighth amendment, (10) the death penalty was disproportionate to the sentence imposed in similar cases, and (11) it was reversible error to permit cross-examination of petitioner about a letter from him to his wife and to admit a portion of the letter into evidence for the limited purpose of impeaching his testimony.

The Georgia Supreme Court undertook a sentence review for excessiveness, proportionality, and the influence of passion, prejudice, or any other arbitrary factor, and whether the evidence supported the jury's findings of aggravating circumstances.

2/ The Supreme Court of Georgia dealt with three issues on appeal from denial of habeas corpus relief: (1) petitioner was deprived of an impartial jury representing a true cross-section of the community as required by Taylor v. Louisiana, 419 U.S. 522 (1975), because persons who would automatically vote against imposing the death penalty without regard to the evidence were excused from the jury. Witherspoon v. Illinois, 391 U.S. 510 (1968). Evidence presented to the habeas corpus court showed that a Witherspoon qualified jury is guilt-prone and hence more likely to convict at the guilt phase of a bifurcated trial. "Because this is a death penalty case," 239 S.E.2d at 510, the court assumed without deciding there was cause to allow the objections to the composition of the traverse jury and did not apply the waiver rule of Wainwright v. Sykes, 433 U.S. 72 (1977), (2) the trial judge erred in failing to inquire of two excused prospective jurors whether they were able to make their personal views on the death penalty subservient to their legal duty as jurors, and (3) a letter from petitioner to his wife should not have been allowed in evidence.

3/ Smith raised three main issues on appeal from denial of federal habeas corpus relief. The exclusion from the jury for cause of two veniremen who were unequivocally opposed to the death penalty violated his sixth and fourteenth amendment rights in three respects: (1) the jury was conviction-prone, and not impartial; the jury did not represent a fair cross-section of the community; and the cumulative effect of such death qualification of jurors infringes the sixth amendment right to a properly functioning jury, (2) petitioner's death sentence was imposed pursuant to an arbitrary and racially discriminatory pattern of capital sentencing in Georgia, and (3) Georgia's capital sentencing review procedures are constitutionally inadequate.

4/ Sparks recalled that, after petitioner's trial, but before Becky Machetti's trial, Maree had "balked" and expressed unwillingness to testify further, protesting that, as Sparks well knew, Maree had no "deal" with the prosecutor. Sparks had reported his client's reluctance to give further testimony to Hasty who persisted in his refusal to promise Maree anything. Ultimately, Maree testified in Becky Machetti's trial, on Sparks' advice, even in the absence of any promise or agreement.

5/ Smith's satisfaction with the jurors called, from which his trial jury would be selected, does not merely appear from lack of objection. It was affirmatively stated in a stipulation and in Smith's counsel's response to a direct inquiry at the commencement of the proceedings on January 27, 1975. Immediately after formal arraignment and plea, the following transpired:

By Mr. Hasty: [for the State]
There is a stipulation that counsel would like to make, on approval of the Court, that in this formal arraignment that we use all names of the jurors who have already been called in the courtroom, that were called and sworn, and we will swear all of those jurors and the jury for this trial will be selected from that group of jurors. All the jurors will be put on the defendant at this time, if that is satisfactory.

By Mr. Byrd: [for the Defendant]
That is perfectly all right.

* * *

By the Court:
The court approves that stipulation.

By Mr. Hasty:
The jurors whose names have been called here in the courtroom this morning and sworn are the jurors good and true to pass between the State and you on the issue of this indictment, charging you with the offenses of Murder, touching your life or death. If you have any challenge to this array of jurors, let it be known at this time in writing, and you shall be heard. Any challenge?

By Mr. Byrd:
We don't have a challenge to the array as such, Your Honor, but, of course, we are reserving our right to the individual challenge.

By the Court:
All right sir.

No. 83-8611, JOHN ELDON SMITH v. RALPH M. KEMP

HATCHETT, J, Concurring in part and Dissenting in part:

I respectfully dissent on the Giglio issue. The prosecutor, Fred Hasty, in his closing argument in John Eldon Smith's 1975 trial, stated:

> I want to tell you one other thing .... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder, and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise. [Emphasis added.]

In Giglio v. United States, 405 U.S. 150, 153-154 (1972), a unanimous Supreme Court stated:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942). In Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct.

1173 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., 269, 3 L.Ed.2d at 1221. Thereafter Brady v. Maryland, 373 U.S., at 87, 10 L.Ed.2d at 218, 83 S.Ct. 1194 (1963), held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 3 L.Ed.2d at 1221. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict ....' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 10 L.Ed.2d at 218. A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ....' Napue, supra, at 271, 3 L.Ed.2d at 1222.

If a prosecutor fails to disclose to the jury an understanding or promise made to a witness, a Giglio violation occurs. Since an understanding existed between the prosecutor, Hasty, and the witness, Maree, undisclosed to the jury, I would remand to the district court for an evidentiary hearing on the issue. In order to appreciate the extent of the possible violation, it is vital to understand the facts as disclosed on the face of the record.

John Maree, a co-participant in the crime, was the key to successful prosecution of the two murders involved in this case. The state's case against Maree was strong. The state's evidence against Maree included his confession, his hand prints from the

victim's automobile, and a witness placing him at the crime scene. The case against Smith was weak. Without Maree's testimony, Smith could not be placed at the crime scene.

Seven years after Smith's trial, Hasty, the prosecutor who tried the case, told Millard Farmer, a lawyer and old acquaintance, that he (Hasty) had made a deal with Maree. Hasty explained that the deal was: a recommendation for a life sentence in exchange for Maree's testimony against the Smiths. Farmer conveyed Hasty's remarks to Smith's counsel in New York. On May 25, 1983, Farmer presented an affidavit to Hasty reciting the subject matter of that prior conversation. After the two men had lunch together, Hasty found an error in the affidavit and had his secretary retype it correcting the error. At the time Hasty signed the affidavit, Farmer informed him that the affidavit would be used in Smith's post-conviction relief efforts. Hasty's affidavit in one portion stated:

> 3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences [sic] of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John Smith and Rebecca Machetti in exchange for sentences [sic] of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders. (Emphasis supplied.)

A month after Hasty executed the affidavit, one of Smith's lawyers telephoned Hasty to inform him that the affidavit would be used in a habeas corpus petition raising a Giglio claim. Hasty did not object and did not claim that the affidavit was incorrect.

In the June 13, 1983, state evidentiary hearing, Hasty testified concerning the case:

> I do know that at one point Mr. Boger [Smith's attorney] mentioned a Giglio motion that he expected to file. I do not recall any statements made about John Eldon Smith's conflict in testimony that he had given. I know that the Giglio motion was mentioned [but] that, at that time did not mean anything to me.

On January 12, 1983, Hasty learned for the first time that the disciplinary board of the Georgia State Bar Association had filed charges against him. Enclosed with the notice of disciplinary action were two items: 1) the transcript of Hasty's closing argument during Smith's 1975 trial in which Hasty told the jury that no promises were made to Maree in exchange for his testimony, and 2) an excerpt from a 1978 deposition in which Hasty stated that he made a pre-trial agreement with Maree to testify against Smith and his codefendant, Rebecca Machetti. The pertinent portion of the 1978 deposition stated:

> A. Well, I talked to Mr. Morae [sic] of course, prior to [petitioner Smith's] trial, and he testified in that case and then he testified in Rebecca Machetti's trial ...
>
> Q. Did he believe that he was going to get off free or get out with a light sentence by testifying?

> A. We had a discussion about this, and I had agreed that if he did testify that I, I would not insist on a trial and would allow him to enter a plea of guilty and receive life sentences.

Thus, Hasty, a seasoned prosecutor, had sworn under oath on two occasions, four years apart, that he made a deal in exchange for Maree's testimony. Because he told the Smith jury no deal had been made, he was in trouble with the Georgia State Bar.

On May 10, 1983, faced with suspension or disbarment, Hasty repudiated his two prior sworn statements at Smith's state habeas corpus evidentiary hearing. Hasty stated that he promised Maree nothing in exchange for his testimony, neither a lighter sentence nor a letter to the parole board. During the same hearing, however, Hasty's testimony reveals that an understanding did exist regarding what sentence he would recommend for Maree. In response to the question of whether he had ever made any promises to Maree's attorney, Sparks, regarding Maree, Hasty testified:

> I recall-I had returned early on in the investigation when I saw what evidence we had, I knew if Mr. Morray [sic] testified, I knew what my recommendation would be. I had determined that and I think I ever discussed that with Mr. Thompson. At one time I thought I had discussed it with Mr. Wilkes, but Mr. Wilkes says I did not. So, I knew what I was going to do. But, because of, again, the policy I had, I did not discuss it with Mr. Sparks. And after the Rebecca Machetti or Rebecca Smith trial was over, I recall-and this would have probably been sometime in March of 1975--I recall Mr. Sparks came to my office and wanted to talk about the case. And earlier in my mind, I had known that if he testified that I was going to make a recommendation of concurrent life sentences. I recall when Mr. Sparks came into my office that we started discussing it and at that time I told him that I would recommend two consecutive life sentences and this upset Mr. Sparks. And he said, "Well, it ought to be concurrent." And I agreed almost immediately with him, that they would be concurrent life--recommendation for concurrent life sentences.

Hasty's explanation for his two prior sworn statements given four years apart: his "mind had become somewhat confused about what had actually happened."

Although no other clear promise is evident in the state court records, the record does show an understanding by all parties as to what would happen in the event Maree did not testify. The central portion of the understanding is illustrated by Maree's testimony. In a sworn affidavit he stated:

> The only statement made pertaining to my trial was that if I did not agree to testify, that then D.A. (Fred Hasty) would assign my case to an assistant district attorney for prosecution and that a death sentence would most likely be sought.

Maree's lawyer, Willie Sparks, characterized the understanding as follows:

> Mr. Hasty did say, as I recall, that if Morray [sic] did not cooperate, it was quite possible that he would be the first man tried, and the state might well seek the death penalty.
>
> ****
>
> Well, after this conversation, while I can't recall precisely what was said, I conveyed to Mr. Morray [sic] that he did not have a deal with the state, but that I thought his best and wisest course purely from the point of view of his self interest was to testify for the state. His alternative was to go to trial on a case where he had already confessed a voluminous confession, where his palm print was found on the car and there was some chance the state would get the death penalty even though he did not appear to be the trigger man.

Hasty's statement of the understanding was:

> Q. Willie Sparks testified that you told him that if John Morray [sic] did not give testimony that he would be tried first and you would have now testified that that's in fact what happened.
>
> A. [Hasty] I do not remember telling Mr. Sparks that, but I know the prosecution business well enough to know that that's what I would have done.
>
> Q. But, it is your intention that if Mr. Morray [sic] did testify to the state, you would leave open the question of whether he in fact would be tried or would be permitted to plead guilty?
>
> A. [Hasty] Did not tell Mr. Sparks what I intended to do.

Due to the inconsistency between Hasty's testimony and his deposition and affidavit, the state court finding of no pretrial agreement is not fairly supported by the record. The incredible finding that Hasty and Maree had no understanding is supported only by Hasty's statement that he was confused. Logic, experience, and events at trial dictate otherwise.

A federal court must make its own credibility findings under these factual circumstances. State court credibility findings are never binding on a federal court. 28 U.S.C.A. § 2254(d)(8); Sumner v. Mata, 449 U.S. 539 (1981). The state record as a whole clearly shows that Hasty communicated to Maree the idea that he would be tried first and the death penalty sought unless he testified against Smith. This understanding, however, was not disclosed to Smith's trial jury. Instead, Hasty

intentionally misled the jury as to Maree's credibility. This is a Giglio violation. Under Giglio there is "no difference between concealment of a promise of leniency and concealment of a threat to prosecute." United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976). No explicit promise or deal need be shown. The due process violation occurs if there is an undisclosed inducement for the witness's testimony. Hawkins v. United States, 324 F.2d 873 (5th Cir. 1973). As the Ninth Circuit so aptly stated:

> [W]e know from experience that the Government, ...[has] ways of indicating to defendant's counsel that benefits are likely to result from cooperation. That can be indicated without making a bald promise that the charge is going to be reduced or that the case is going to be dismissed.

United States v. Butler, 567 F.2d 885, 888, n.4 (9th Cir. 1978).

The majority and the trial judge dismiss this issue with the comment that any juror would know that Maree sought to save his life by testifying. They miss the point. The point is that the jury did not know that an understanding had been reached and the witness was testifying with the assurance that his life had been saved. Giglio merely holds that the understanding must be disclosed. An affirmative duty is on the prosecutor to disclose the understanding rather than have the jurors attempt to figure it out. The jurors must know the facts so they may judge the testimony given in light of the interest the witness is or is not

seeking to protect. As Justice Frankfurter said in Griffin v. United States, 336 U.S. 704, 709 (1949): "it would .., be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

Because the state findings are unsupported by the record as a whole, I would remand this case to the district court for an evidentiary hearing

This case again illustrates the difficulty, if not the impossibility, of imposing the death penalty in a fair and impartial manner. It is a classic example of how arbitrarily this penalty is imposed. Maree, who bargained to receive $1,000 for the murder and on whom the evidence was the strongest, is eligible for parole in November 1983. He will live because the evidence against him was overwhelming and the prosecutor needed his testimony to convict Smith and Machetti. Thus, a deal was struck.

Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Her lawyers timely raised this constitutional objection. They won; she lives.

John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation of women issue, even under principles of "manifest injustice." The fairness promised in Furman v. Georgia, 408 U.S. 238 (1972), has long been forgotten.

APPENDIX B

GEORGIA, BUTTS COUNTY
I HEREBY CERTIFY THE WITHIN AND FOREGOING TO BE A TRUE, CORRECT AND COMPLETE COPY OF THE ORIGINAL THAT APPEARS OF RECORD IN THIS OFFICE 25 DAY OF June 1982
Chief Deputy CLERK, BUTTS SUPERIOR COURT, BUTTS COUNTY, GEORGIA

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN ELDON SMITH,

Petitioner,

-against-

WALTER D. ZANT, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

HABEAS CORPUS NO. 5588

ORDER

Petitioner, John Eldon Smith, having presented a petition for writ of habeas corpus against Walter D. Zant, Superintendent of the Georgia Diagnostic & Classification Center, attacking the legality of his imprisonment, and this Court, having carefully examined the petition and concluding that petitioner's claims are without merit.

ORDERED, that the petition for writ of habeas corpus be, and the same hereby is, dismissed.

This 25 day of June, 1982.

JUDGE, SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

FILED June 25 1982 10:05 A
CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN ELDON SMITH,
Petitioner,

CIVIL ACTION NO. 5588

V.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Respondent.

ORDER NUNC PRO TUNC

The above-styled petition for a writ of habeas corpus was submitted to this court by August F. Siemon, for counsel of record on this date. However, counsel for Respondent was not notified of the intention of Petitioner to file this petition or of its filing or of the presentation to this court of an Order dismissing this petition as successive . Without the presence of Respondent's counsel or notice to them, this Court dismissed this petition as successive. At the same time, Mr. Siemon filed a Notice of Appeal from this Court's order.

After the petition had been presented to the Court, filed, dismissed as successive, and a Notice of Appeal filed, counsel for the Respondent was notified by the Deputy Clerk of Butts County of the foregoing disposition of this habeas petition.

Having been notified by the Deputy Clerk of the foregoing disposition of this case, counsel for Respondent immediately contacted this court, voicing their objections to the disposition of this case without notice.

Counsel for the Respondent informed the Court of the extensive procedural history of this matter, including the fact that a petition for certiorari from the denial of federal habeas corpus relief is imminently anticipated. Having been apprised of the extensive procedural history of this case, and the concern of counsel for the Respondent over the lack of notification

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CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

FORCE AND EFFECT.

Further, this Court hereby declines to sanction this successive habeas corpus petition.

So order, this the 25th day of June, 1982.

SAM L. WHITMIRE

APPENDIX C

39172

SUPREME COURT OF GEORGIA

ATLANTA. September 16, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

John Eldon Smith v. Walter D. Zant, Superintendent

It is hereby ordered that this case be remanded to the trial court for an evidentiary hearing on the issues raised in the Petition for Habeas Corpus filed in the trial court on June 25, 1982.

The appeal will remain pending in this Court. It is requested that such hearing be held and the transcript thereof and Order of the trial court be filed with the trial court clerk within 60 days and that such clerk certify and transmit copies to this Court as expeditiously as possible.

All the Justices concur, except Jordan, C.J., Clarke and Weltner, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX D

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN ELDON SMITH, a/k/a ANTHONY MACHETTI, Petitioner,	*	CIVIL ACTION NO. 5588
v.	*	
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, Respondent.	*	HABEAS CORPUS

ORDER

The above-styled case came on for hearing on November 8, 1982, pursuant to the order of the Supreme Court of Georgia, dated September 16, 1982 remanding this case to the Court for an evidentiary hearing on the issues raised in the petition filed in this Court on June 25, 1982.

On November 1, 1982, in open court, counsel for Petitioner and Respondent argued to this Court the scope of the hearing to be held November 8, 1982, with reference to this "successor petition for writ of habeas corpus." Having taken the argument of counsel and their citations of authority under advisement, on November 3, 1982, this Court entered an order defining the parameters of the November 8, 1982 hearing by stating that because the Petitioner had admitted this was a second or successive petition, this Court would have to determine initially whether or not under O.C.G.A. § 9-14-51 (Michie 1982); Ga. Code Ann. § 50-157(10) (Harrison 1977), Petitioner had waived these grounds now presented in his successive habeas corpus petition, by failing to raise them in his original or amended petition. Having entered this order, this Court held an evidentiary hearing on November 8, 1982 to determine the issue of whether

or not Petitioner had waived his right to present any of these claims by means of a successive habeas corpus petition.

At this hearing, Mr. John Charles Boger and Mr. Robert C. Glustrom appeared as counsel for the Petitioner and Ms. Susan Boleyn and Mr. William B. Hill appeared as counsel on behalf of the Respondent.

This Court heard evidence with reference to whether or not under O.C.G.A. § 9-14-51(Michie 1982); Ga. Code Ann. § 50-127(10) (Harrison 1977), Petitioner had waived his right to present the three issues raised by means of his "successor habeas corpus petition." This code section reads as follows:

> "All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be rasied by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this State otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

In Hunter v. Brown, 236 Ga. 168 (1976), the Supreme Court of Georgia stated that the purpose of this code section was to ". . . discontinue the practice of filing multiple habeas corpus petitions under a single conviction." Id. at page 169. More recently, in Dix v. Zant, ___Ga.___, No. 38623, decided September 10, 1982, the Supreme Court of Georgia stated that:

"Accordingly, a subsequent habeas petition effects a waiver on any grounds not originally raised, subject to exceptions. First, where the state or the federal Constitution provides otherwise; and second, if the judge presiding finds other grounds in the subsequent petition which could not reasonably have been raised in the original or amended petition . . ."

The three issues which Petitioner raises in this second habeas corpus petition are as follows: (1) that Petitioner's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the prosecution's alleged failure to reveal that state's witness John Maree allegedly testified falsely on cross-examination, that he had not been promised anything in return for his testimony except protection for himself and his family; (2) that the death penalty in Georgia is arbitrarily and racially imposed in Georgia so as to discriminate against the Petitioner and violate his rights under the Eighth Amendment and the equal protection clause of the Fourteenth Amendment; (3) that Petitioner's grand and traverse juries were unconstitutionally composed, in that women were systematically underrepresented in the jury pool, so as to violate Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This Court notes that Petitioner has failed to show that either the state or federal Constitutions delineate any of the three grounds raised by Petitioner as being non-waivable. Therefore, Petitioner has failed to satisfy the first condition which would exempt him from the waiver provision as to this second habeas corpus petition. With reference to whether or

not these grounds could have been reasonably raised in Petitioner's original state habeas corpus petition filed in the Superior Court of Tattnall County in 1976, this Court heard testimony and received documentary evidence, as well as hearing argument of counsel, as to each of these issues separately. This Court specifically ruled that all of the evidence received by this Court in the hearing held on November 8, 1982, was admitted with reference to whether or not these issues had been waived by the failure of counsel to present them on Petitioner's behalf in his first habeas corpus petition filed in the Superior Court of Tattnall County, Georgia. Certain affidavits were offered with reference to each of these allegations and counsel for the Respondent objected to certain of these affidavits, specifically, Petitioner's Exhibits 4 and 5, on the basis that they had not received timely notice of the Petitioner's intent to introduce these affidavits. Counsel for Respondent also objected to the affidavit of David Baldus, Petitioner's Exhibit No. 2, as constituting inadmissible hearsay. While noting these objections, this Court holds that these affidavits are relevant to the issues to be determined by this Court and therefore, admits these affidavits into evidence, over the objection of counsel for the Respondent.

With respect to the first issue raised by the Petitioner relating to the alleged undisclosed plea bargain between the state and state's witness John Maree, Petitioner offered Petitioner's Exhibit No. 3, an affidavit of Fred Hasty, the district attorney at the time Mr. Maree was tried; Petitioner's Exhibit No. 4, the affidavit of Mr. Garland T. Byrd; Petitioner's Exhibit No. 5, the affidavit of Floyd M. Buford; and Petitioner's Exhibit No. 6, an excerpt of state's witness Maree's testimony at Petitioner's trial. Additionally, Petitioner offered the

live testimony of co-counsel Robert C. Glustrom, who along with various other attorneys, represented Petitioner at the time his original state habeas corpus petition was filed in the Superior Court of Tattnall County, Georgia. In addition to cross-examining Mr. Glustrom, counsel for the Respondent called Mr. Boger for purposes of cross-examination and also called Mr. Willis Sparks, the attorney who represented Mr. Maree at the time Mr. Maree testified at Petitioner's trial and when Mr. Maree entered his plea of guilty and received life sentences in the Superior Court of Bibb County, Georgia.

This Court notes with respect to this contention, that Petitioner was represented at all times by at least one attorney and usually more than one and finds that Petitioner has failed to establish that the first ground raised by means of this second habeas corpus petition could not reasonably have been raised in the original habeas corpus petition filed in the Superior Court of Tattnall County, Georgia.

With respect to the second issue raised by the Petitioner, the evidence before the Court from both the Petitioner and the Respondent indicates that the allegation that the death penalty has been arbitrarily and discriminatorily imposed in Georgia with respect to race, as well as sex and poverty, has been litigated in prior proceedings initiated by the Petitioner, including his initial state habeas corpus petition, his federal habeas corpus petition, his appeal to the United States Court of Appeals for the Eleventh Circuit and his petition for a writ of certiorari from the denial of federal habeas corpus relief to the Supreme Court of the United States.

Petitioner's Exhibit No. 1 is a copy of the decision of the United States Court of Appeals for the Eleventh Circuit, filed following Petitioner's petition for rehearing in that court.

Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982). The court found that the data presented by the Petitioner at that time did not establish that Georgia's death penalty had violated his right to equal protection.

This issue not only could have been raised in Petitioner's first habeas corpus petition, but was in fact raised in that proceeding and throughout the other post-conviction proceedings filed by the Petitioner. Therefore, that portion of the petition alleging this ground is truly successive in that it seeks to relitigate claims which have previously been determined to be without merit by the state habeas corpus court, the Supreme Court of Georgia and others courts in which Petitioner has raised this issue. This Court declines to relitigate this issue by means of a second, successive state habeas corpus petition.

Petitioner's final allegation relates to the alleged unconstitutional composition of the grand and traverse juries with respect to women. This allegation was not raised prior to trial as required under Georgia law as codified in O.C.G.A. § 15-12-162 (Michie 1982); Ga. Code Ann. § 59-803 (Harrison 1977). The evidence before the Court also indicates that this issue was not raised in Petitioner's first habeas corpus hearing, nor in the other proceedings which were filed by the Petitioner following his conviction and sentence. Counsel for the Petitioner presented evidence in the form of the affidavits of Petitioner's two trial attorneys, Mr. Byrd and Mr. Buford, Petitioner's Exhibit Nos. 4 and 5, as well as presenting the testimony of Robert C. Glustrom. Respondent called Mr. Glustrom and Mr. Boger for cross-examination.

Pretermitting the question of whether Petitioner has waived his right to present the jury issue by failing to make a timely

challenge to the array of the grand and traverse jury, as required by Georgia law, this Court finds that Petitioner has failed to show that this issue reasonably could not have been raised in his previous habeas corpus action.

This Court expressly declines to review the merits of any of the grounds raised by means of this second habeas corpus petition which this Court finds to be successive, as to each ground, under O.C.G.A. § 9-14-51 (Michie 1982); Ga. Code Ann. § 50-127(10) (Harrison 1977) and Dix v. Zant, ___Ga.___, Case No. 38623, decided September 10, 1982.

For these reasons, this Court dismisses this petition for a writ of habeas corpus, as successive, and enters judgment in favor of the Respondent.

SO ORDERED this 15 day of NOV., 1982.

Sam L. Whitmire

SAM L. WHITMIRE, Judge
Superior Court
Flint Judicial Circuit

APPENDIX E

merits as this court has held that the probation of a jail sentence may constitutionally be conditioned upon the lump sum payment of a fine when the defendant is indigent. See, *Hunter v. Dean*, 240 Ga. 214 (239 SE2d 791) (1977).

Judgment affirmed. All the Justices concur.

DECIDED MARCH 1, 1983.

Failure to disperse; constitutional question. Fulton State Court. Before Judge Bruner.

Torin D. Togut, for appellants.

Hinson McAuliffe, Solicitor, Deborah S. Greene, E. Duane Cooper, Assistant Solicitors, for appellee.

39172. SMITH v. ZANT.

HILL, Chief Justice.

John Eldon Smith appeals from the dismissal of his successive state habeas petition in which he alleged three constitutional issues. He contends he is entitled to a hearing on the merits of these issues under OCGA § 9-14-51 (Code Ann. § 50-127), and that the habeas court erred in holding that he had waived his right to raise them and in dismissing his petition.

John Eldon Smith, also known as Anthony Isalldo Machetti, was convicted of the shotgun slayings of his wife's former husband and second wife, and was sentenced to death.[1] His conviction was affirmed in *Smith v. State*, 236 Ga. 12 (222 SE2d 308) (1976), cert. denied, 428 U. S. 910 (96 SC 3224, 49 LE2d 1219) (1976), and the denial of his first state habeas was also affirmed in *Smith v. Hopper*, 240 Ga. 93 (239 SE2d 510) (1977), cert. denied, 436 U. S. 950 (98 SC 2859, 56 LE2d 793) (1978). Smith's federal habeas petition was denied in an unpublished order from the Middle District of Georgia and affirmed on appeal in Smith v. Balkcom, 660 F2d 573 (5th Cir.

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[1] Mrs. Machetti also received the death sentence at a separate trial, which was also affirmed at 236 Ga. 12 (222 SE2d 308) (1976), cert. denied, 429 U. S. 932 (97 SC 339, 50 LE2d 302) (1976). The denial of her petition for declaratory judgment was affirmed at 238 Ga. 656 (235 SE2d 375), cert. denied, 434 U. S. 878 (98 SC 232, 54 LE2d 159) (1977), and her application to appeal the denial of her first state habeas petition was also denied. Her first federal habeas was denied in Machetti v. Linahan, 517 FSupp. 1078 (M.D. Ga. 1981), but was reversed on appeal, Machetti v. Linahan, 679 F2d 236 (11th Cir. 1982), cert. denied, —— U. S. —— (—— SC ——, 74 LE2d 978) (1983).

1981), modified on rehearing, 671 F2d 858 (5th Cir. 1982).

Thereafter, Smith filed this, his second state habeas petition, raising constitutional issues: (1) that women were underrepresented on both his grand and petit jury panels; (2) that Georgia's death penalty statute is being applied arbitrarily and in a racially discriminatory pattern; and (3) that the failure of the prosecution to correct the testimony of John Maree, an accomplice and eyewitness who testified against Smith at his trial that he had no plea agreement with the state when that statement was not true, denied him due process and a fair trial. The habeas court dismissed his petition without a hearing as successive.

We granted Smith's application to appeal, which urged us to require the habeas court to grant him a hearing on the constitutional issues, and we immediately ordered "an evidentiary hearing on the issues raised in the petition," while retaining jurisdiction of the case. The habeas court held an evidentiary hearing, but limited its scope to whether the three constitutional issues had been waived by failing to raise them in his first habeas petition. After finding that all three issues were or should have been raised earlier, the habeas court again dismissed the petition as successive under OCGA § 9-14-51 (Code Ann. § 50-127). The transcript of that hearing was sent up, new enumerations of error were filed, and oral argument was heard on an expedited basis because we had retained jurisdiction of the original appeal. See OCGA § 9-14-52 (Code Ann. § 50-127).

1. Relying on OCGA § 9-14-51 (Code Ann. § 50-127), discussed in greater detail below, Smith seeks to raise the underrepresentation of women on his jury panels as a ground "which could not reasonably have been raised" in his original habeas petition. He argues that Taylor v. Louisiana, 419 U. S. 522 (95 SC 692, 42 LE2d 690) (1975), holding that the constitution required that women be represented adequately in jury pools, was decided only a few days before his trial.

Petitioner did not raise any challenge to his grand or traverse juries prior to his trial as required by law. *Harris v. Hopper*, 243 Ga. 244 (2) (253 SE2d 707) (1979), and cases cited; Francis v. Henderson, 425 U. S. 536 (96 SC 1708, 48 LE2d 149) (1976). He did not raise any challenge to his grand or traverse juries in his first habeas petition. OCGA § 9-14-42 (b) (Code Ann. § 50-127), applicable to the first habeas petition, provides in pertinent part: "The right to object to the composition of the grand or trial jury will be deemed waived under this Code section unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has

otherwise become final." Petitioner did not seek to amend his first habeas corpus petition to add jury challenges while it pended for over a month nor while it was under consideration for over three additional months.

In both his first state habeas and in his federal habeas petition a related issue based on Taylor v. Louisiana, supra, was unsuccessfully raised. *Smith v. Hopper*, supra, 240 Ga. at 94; Smith v. Balkcom, supra, 660 F2d at 582. In neither his first nor second habeas petitions has he raised any question as to the competency of his trial counsel or his first habeas counsel.

Petitioner has not shown grounds for raising this issue in his second habeas petition and the habeas court did not err in refusing to hear the matter on its merits.

2. OCGA § 9-14-51 (Code Ann. § 50-127) provides: "All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. *Any grounds not so raised are waived [1] unless the Constitution of the United States or of this state otherwise requires [2] or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.*" (Emphasis and brackets supplied.)

Thus, in considering a successive petition, the habeas court must determine, as the threshold matter, whether the petitioner is entitled to a hearing on the merits of his belated claims. See *Smith v. Garner*, 236 Ga. 81, 85 (222 SE2d 351) (1976). In order to be so entitled, the petitioner must raise grounds which are either constitutionally nonwaivable or which could not reasonably have been raised in the earlier petition. *Fuller v. Ricketts*, 234 Ga. 104 (214 SE2d 541) (1975); *Dix v. Zant*, 249 Ga. 810, 811 (294 SE2d 527) (1982). For example, in *Smith v. Garner*, supra, where the successive petitioner's first habeas attorney would not raise several constitutional issues despite the petitioner's requests to do so, the petitioner was allowed to proceed on the merits of his second petition. But, in *Samuels v. Hopper*, 234 Ga. 246 (215 SE2d 250) (1975), where ineffective assistance of trial counsel had been raised in petitioner's first habeas, his claim in the successive petition that the failure of his appointed trial counsel to inform him of his right to appeal was dismissed. Accord, *Yates v. Brown*, 235 Ga. 391 (3) (219 SE2d 729) (1975); *Fuller v. Ricketts*, supra.

Smith's claim that the Georgia death penalty statute is being applied arbitrarily and discriminatorily fails to meet either test of OCGA § 9-14-51 (Code Ann. § 50-127). Smith raised the unconstitutional application of the death penalty statute in his first

state habeas as well as in his federal habeas petition.[2] On rehearing, in Smith v. Balkcom, supra, 671 F2d 858-59 (5th Cir. 1982), the court had this to say on the issue: "In some instances, circumstantial or statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose. [Cits.] Smith's evidence, however, does not present such a case. The raw data selected for the statistical study bear no more than a highly attenuated relationship to capital cases actually presented for trial in the state. The leap from that data to the conclusion of discriminatory intent or purpose leaves untouched countless racially neutral variables. [fn.] The statistics are not inconsistent with the proper application of the structured capital punishment law of the state found constitutional in *Gregg v. Georgia*, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). Here, the proffered evidence would not have been of sufficient probative value to have required response and no hearing was required." Now, in his successive state habeas, Smith seeks to bolster his claim of discriminatory application with preliminary analysis of a more recent study. Since, however, the ground has previously been raised and rejected, it is not cognizable in a successive petition under the requirements of OCGA § 9-14-51 (Code Ann. § 50-127), and was properly dismissed. If the rule were otherwise, a "new study" could be produced quarterly by another investigator using more detailed data to form the basis of yet another habeas petition.

3. Smith also alleges prosecutorial misconduct as another basis for granting him habeas relief. Smith's accomplice, John Maree, testified against him at trial, stating that he was an eyewitness to the murders and that Smith was the triggerman. "According to the testimony of accomplice John Maree, he was to be paid $1,000 for his participation. He testified that he and the appellant Tony Machetti drove to Macon, Georgia, where they contacted Ronald Akins and lured him into the area of the crime, ostensibly to install a television antenna, and that when he and his wife arrived at the appointed time the appellant Tony Machetti killed both of them with a shotgun. . . ." *Smith v. State*, supra, 236 Ga. at 12.

At trial, on cross-examination, the following series of questions and answers transpired between the witness Maree and Smith's defense attorney:

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[2] Pursuant to the federal requirement of exhaustion of state remedies, the federal courts would not have entertained this claim if it had not been raised in the state courts.

Q: "How many times have you talked to Mr. Ray Wilkes [chief deputy sheriff] about this case?"

A: "Five or six times."

Q: "How many times have you talked to Mr. Fred Hasty [the district attorney] about it?"

A: "Possibly twice, I think twice, yes, sir."

Q: "How many times have you talked to Mr. Don Thompson who is connected with Mr. Hasty?"

A: "Once alone and with Mr. Wilkes being there and once with Mr. Hasty."

Q: "At the time that you talked with Mr. Wilkes in exchange for your statement, were you promised anything?"

A: "The only thing that was promised to me was protection for my family and myself. There were threats involved in this thing."

Q: "How about in respect to your liberties your freedom?"

A: "Nothing has ever been said of that."

Q: "Have you ever indicated to anyone that you expected to be out shortly?"

A: "No, sir."

Q: "Have you ever made the statement to anyone that you expected to be outside soon, on the outside?"

A: "No I haven't."

Q: "[Did you ever write in a letter which the witness was looking at to refresh his memory:] 'I expect to have plenty of fresh air on the outside soon?' "

A: "No, sir."

Thus at trial it appeared that Maree had no agreement with the state in exchange for his testimony except protection for his family and himself because of "threats." Neither the district attorney nor any other representative of the state attempted to correct or alter this impression. In fact, in closing argument, the district attorney stated to the jury: "I want to tell you one other thing. . . . The indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr., with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those other two defendants will be convicted of Murder, and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he

is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that *but he told you, and I can tell you, there has been no promise.*" (Emphasis supplied.)

In April, 1982, however, it came to light from another attorney who spoke to former district attorney Fred Hasty at a meeting of Georgia criminal defense lawyers that Maree may in fact have had an agreement with the state. Hasty thereafter swore to the following by affidavit:[3]

"3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John and Rebecca Smith in exchange for sentences of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders.

"4. Both Don Thompson and Chief Deputy Sheriff Ray Wilkes knew prior to the trial of John Smith of the agreement under which John Maree would receive life sentences in exchange for his testimony against John Smith and Rebecca Smith/Machetti.

"5. I have never informed any attorneys representing Mr. Smith in state or federal post-conviction proceedings of this agreement.

"6. At a conference of Georgia criminal defense lawyers held in late April, 1982, upon being questioned, I mentioned the fact of this agreement to another defense lawyer whom I have known for a number of years. He asked me certain details of the plea discussions with John Maree and I gave them to him.

"7. Subsequently, on May 25, 1982, I have been asked to execute this affidavit, setting forth all the facts included herein. I do so now, averring that all I set forth herein is true and accurate."

If true, and the state as yet has not met these assertions on their merits, such facts present a serious constitutional issue of prosecutorial misconduct. Napue v. Illinois, 360 U. S. 264 (79 SC 1173, 3 LE2d 1217) (1958); Giglio v. United States, 405 U. S. 150 (92 SC 763, 31 LE2d 104) (1972). The facts in Napue v. Illinois are strikingly similar to this case. At Napue's trial for murder, one of his

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[3] Fred Hasty was the prosecutor at Smith's trial. He later went into the private practice of law. Smith's second habeas petition was filed thirty days after Hasty's affidavit was obtained.

accomplices, one Hamer, testified against him. Hamer was serving a 199-year sentence for his participation in the crime. At Napue's trial, Hamer testified that he had received no promise from state officers that they would assist him in obtaining a reduced sentence in exchange for his testimony. Hamer did say that a public defender had said he would try to do something for Hamer. As a matter of fact, the prosecuting attorney had promised Hamer he would seek reduction of Hamer's sentence, and later undertook to do so, but the prosecutor did nothing to correct Hamer's false testimony at Napue's trial.

The U. S. Supreme Court held that a state may not knowingly use false testimony to obtain a conviction, that this rule is applicable even where the falsity relates only to the credibility of the witness, that the prosecutor's failure to correct the testimony of the witness which the prosecutor knew to be false denied the defendant due process of law in violation of the Fourteenth Amendment, and that the fact that the jury knew that the witness testifying falsely had an interest in testifying against the defendant (he hoped the public defender could get his sentence reduced) did not turn a tainted trial into a fair trial. The court said (360 U. S. at 269): "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." The Court went on to say (360 U. S. at 270): "Had the jury been apprised of the true facts, however, it might well have concluded that Hamer [Maree] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which Hamer [Maree] was testifying, for Hamer [Maree] might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration."

The state, as stated above, did not meet petitioner's false testimony claim on its merits, but defended on the ground of waiver, contending that, with due diligence, the defense could have ascertained the necessary information, and thus that the grounds for relief could "reasonably have been raised in the original or amended petition." OCGA § 9-14-51 (Code Ann. § 50-127), supra. The state urges that when, shortly after the trials, Maree in fact pleaded guilty in exchange for a life sentence, Smith and his lawyers should have made further inquiry of Maree and his attorney. This was not done. Nor has the state shown that Maree would have admitted his alleged perjury had he been asked by defense counsel.

The state's argument overlooks the thrust of Napue v. Illinois, supra, 360 U. S. at 269; and Giglio v. United States, supra, 405 U. S. at 153-54. It is not so much that Maree testified falsely, but that the

state, by allowing this knowingly false statement to stand uncorrected deprived the defendant of a fair trial. Since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense. The defendant has a right to rely on the accuracy of the trial testimony of the state's witness where the truth or falsity of his testimony is peculiarly within the knowledge of the state and the state is under a duty to reveal false testimony. Thus, we find unpersuasive the state's argument that the defendant should have discovered the state's breach of duty. As was said in *Williams v. State*, 250 Ga. 463, 466 (298 SE2d 492) (1983): "The state urges that the defendant should have done more than he did to protect himself. We find that the state should have done more than it did to protect the defendant's rights." See also Price v. Johnston, 334 U. S. 266, 286 (68 SC 1049, 92 LE 1356) (1949).

We, therefore, hold that Smith has alleged facts, supported by affidavits, sufficient to satisfy the requirements of OCGA § 9-14-51 (Code Ann. § 50-127) to entitle him to a hearing on the merits of his false testimony claim; i.e., petitioner has shown grounds for relief which could not reasonably have been raised in his original habeas petition. The habeas court erred in dismissing Smith's Napue-Giglio claim, and we remand this case for a hearing on the merits of this issue. *Smith v. Garner*, supra, 216 Ga. 31.

Judgment affirmed in part; reversed in part and case remanded. All the Justices concur.

DECIDED MARCH 1, 1983.

Habeas corpus. Butts Superior Court. Before Judge Whitmire.

Robert C. Glustrom, August F. Siemon III, Jack Greenberg, James M. Nabrit III, Joel Berger, John Charles Boger, Deborah Fins, James S. Liebman, Anthony G. Amsterdam, for appellant.

Michael J. Bowers, Attorney General, Susan V. Boleyn, Assistant Attorney General, for appellee.

39201. DEVIER v. THE STATE.
39253. ROGERS v. THE STATE.

WELTNER, Justice.

1. Devier and Rogers were indicted by a grand jury of Floyd County for unconnected murders. Both were convicted and sentenced to death in unrelated trials.

APPENDIX F

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHN ELDON SMITH,	:	
Petitioner,	:	CASE NO. 5588
	:	
v.	:	HABEAS CORPUS
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
Respondent.	:	

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O R D E R

In its decision rendered on March 1, 1983, the Supreme Court of Georgia remanded the above-styled matter to this Court for an evidentiary hearing on the merits of Petitioner's "Napue-Giglio" claim. Smith v. Zant, 250 Ga. 645, 652, 301 S.E. 2d 32 (1983). The basis of Petitioner's Napue-Giglio claim, as stated by the Supreme Court, was whether the state made an agreement with accomplice John Maree in exchange for his testimony against Petitioner at Petitioner's trial, which should have been disclosed to the trial jury. Id. at 649-650.

Pursuant to the ruling of the Supreme Court of Georgia, this Court conducted extensive evidentiary hearings on the merits of this issue. Having considered all of the testimony presented at both of these hearings, observed the documentary evidence introduced by both parties, after hearing and considering arguments by counsel, and having reviewed applicable legal authority addressing similar issues, this Court makes the following Findings of Fact and Conclusions of Law:

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Aug 5 1983 9:05 AM
CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

FINDINGS OF FACT

Petitioner John Eldon Smith was tried in the Superior Court of Bibb County on two counts of murder in January of 1975. At Petitioner's trial, accomplice John Maree, who had also beeen

witness on behalf of the state and implicated Petitioner in the crimes.

As was noted by the Supreme Court of Georgia, certain questions were asked of accomplice John Maree on cross-examination during Petitioner's trial. That portion of Petitioner's trial transcript reflecting the cross-examination of Maree on relevant matters was introduced as Petitioner's Exhibit No. 6 during the May 10, 1983 evidentiary hearing held in this Court. The relevant portion of Maree's testimony is cited by the Supreme Court of Georgia in its decision in Smith v. Zant, supra at 649. As the Supreme Court of Georgia noted, "thus at trial it appeared that Maree had no agreement with the State in exchange for his testimony except protection for his family and himself because of 'threats'." Id.

Further, as noted by the Supreme Court of Georgia, then District Attorney Fred Hasty stated in his closing argument to the jury that there had been no promise to John Maree in exchange for his testimony, except protection of Maree's family. Id. at 649-650. The transcript of Mr. Hasty's closing argument was introduced as Petitioner's Exhibit No. 10 during the first evidentiary hearing held in this Court and constitutes pages 652-670 of Petitioner's trial transcript. As noted by the Supreme Court of Georgia, Mr. Hasty specifically referred to the testimony of John Maree during the trial and stated "you heard his [Maree's] testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that what he told you and I can tell you, there has been no promise." (Petitioner's Exhibit No. 10, trial transcript p. 669).

Mr. Maree testified before this Court and stated that he [Maree] and John Smith arrived in Bibb County on November 6, 1974. November 7, 1974, Maree gave then Chief Deputy Ray

Wilkes a confession concerning the case. (HT. II, p. 11).[1] After having made his confession, Maree testified that the following occurred with reference to the question of any agreement between himself and the state in exchange for his testimony against Petitioner. Maree stated:

> There wasn't really even time to think about anything like that. So, I knew that a statement like that could be used against me in any way, and I had no expectations of anything at all as far as that goes at that time.

(HT. II, p. 11).[2]

Further, Mr. Maree stated the following with specific reference to any converations he had with then District Attorney Fred Hasty concerning his willingness to testify against the Petitioner, who was tried prior to the trial of co-defendant Rebecca Smith Machetti who had been indicted on the same two murders:

> A. At the first trial, there was no question about testifying. I didn't have any real converations regarding any kind of a deal whatsoever. Nothing came up on that until midway between

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[1] References to the Transcript of the May 10, 1983 hearing before this Court will hereinafter be referred to by "HT", followed by the appropriate page number. References to the June 10, 1983 hearing transcript will be designated by "HT II," followed by the appropriate page number.

[2] This Court has employed the unusual procedure of quoting extensively from the transcripts of the evidentiary hearings in this Court for the reason that the actual discussions held between various witnesses testifying at these evidentiary hearings is of material importance to the resolution of the issue which was the basis for the remand of the Supreme Court of Georgia.

the two trials; and, at that time, I stated that I wanted to go to trial myself. And Mr. Hasty stated that if I went to trial that he would have to step down from the case and turn it over to one of his assistants and they would go for the death penalty.

Q. When you speak of the two trials, do you have reference to the trial of John Eldon Smith, and then, Rebecca Smith Machetti?

A. That is correct.

Q. What, if any, discussions did you have with Fred Hasty in which he promised you that you would receive a life sentence if you would testify against John Eldon Smith?

A. There wan't any discussion to my knowledge, toward this kind of a situation at all.

(HT. II, p. 10).

Respondent's Exhibit No. 1 introduced at the second evidentary hearing held in this Court consisted of a one page letter which Maree testified that he wrote between the trials of John Eldon Smith and Rebecca Smith Machetti to then District Attorney Fred Hasty, to be used by Hasty in his preparation of the case against Ms. Smith Machetti. The last paragraph of the document which Mr. Maree identified as having been written by him states that, "since you can't tell me what you have in mind in my own case, I have to assume the worst . . . you have the case, what are you going to do with me?' (HT.II, p. 18, Respondent's Exhibit No. 1).

Mr. Willis B. Sparks, III represented John Maree on the murder charges brought against him in the Superior Court of Bibb County in 1974. (HT. 47-48). At the time that Mr. Sparks was appointed to represent John Maree, Maree had already given a very detailed confession and the cases of all three co-defendants were pending. (HT.48-49). Mr. Sparks stated that early in his representation of Mr. Maree, then Assistant District Attorney Don Thompson, approached Mr. Sparks in an attempt to secure the testimony of Mr. Maree to testify for the state in the trials of John Eldon Smith and Rebecca Smith Machetti. (HT. 50). Mr. Sparks stated that he had a conference with Mr. Hasty, during which Mr. Thompson might also have been present, in which Mr. Sparks pointedly asked District Attorney Hasty "what was in it" for John Maree if he acted as a state's witness. (HT. 50). Mr. Sparks stated that the following discussion occurred:

> And Mr. Hasty's response was that he would not make any agreement with a co-defendant prior to trial, that he had never done that in any case. Mr. Jack Gautea (sic) who had been the district attorney before him would not follow that policy, that it was considered an improper way to do things, and if John Morray (sic) wanted to testify as a state's witness, he might do so. But, he would do so without any promise. So, it was left with me to advise Morray (sic) of what he should do next. Mr. Hasty did say next, as I recall, that if Mr. Morray(sic) did not cooperate, it was quite possible that he would be the first man tried and the state might well seek the death penalty. But, he declined to give me any hint whatsoever as to what sort of sentence he might obtain if in fact he did testify for the state.

(HT. 50).

Mr. Sparks stated that none of the subsequent discussions that he had with District Attorney Hasty on Mr. Maree's behalf altered the understanding between the State and Mr. Maree. Mr. Sparks stated that Mr. Hasty was "steadfast" in that " . . . he would not make a deal in advance with a co-defendant." (HT. 51).

With respect to what Mr. Sparks told his client, Mr. Sparks stated that he could not recall precisely the nature of the discussions that he had with Mr. Maree, but that:

> . . . I conveyed to Mr. Morray (sic) that he did not have a deal with the state, but that I thought his best and wisest course purely from the point of his self-interest was to testify for the state. His alternative was to go to trial on a case where he had already confessed a voluminous confession, where his palm print was found on the car and there was some chance the state would get the death penalty even though he did not appear to be the trigger man. Mr. Morray's (sic) attitude was a little bit strange at first. He showed almost no interest in the outcome of the case as to him at all. He professed to be in love with Mrs. Machetti's daughter. I forget which one. And for that reason and because he thought Mrs. Machetti would murder that daughter if she ever got out, he determined he did wish to testify for the state. A little later on in my representation of him, he became more interest in his own welfare and began to complain rather bitterly that he didn't have any deal worked out.

(HT. 51-52).

Introduced as Respondent's Exhibit No. 2 at the first evidentiary hearing in this case, was a photographic copy of an article from the Macon Telegraph dated March 2, 1975, in which Mr. Sparks was quoted as saying that, "I am hopeful in view of Maree's cooperation that he might get a life sentence, but there has been no commitments from the District Attorney and the Court has the final say so." (HT. 57-58). Mr. Sparks stated that he had an independent recollection of having made that statement and that that was in fact the situation at the time Mr. Maree testified at Petioner's trial. (HT. 58).

Fred Hasty, who was the district attorney in the Macon Judicial Circuit in 1974, testified before this Court that he never promised Maree anything in exchange for his testimony against petitioner. (HT., p. 76). Mr. Hasty also stated that no one in his office made any promises to Mr. Maree, to his knowledge. (HT. 76-77). Mr. Hasty stated that he knew what his recommendation would be if Mr. Maree testified, but that because of his policy, he did not discuss the matter with Mr. Sparks. (HT. 77). After Mr. Maree testified at the trial of the Petitioner and Rebecca Smith Machetti, Mr. Maree pled guilty and the state and the defense made a joint recommendation for concurrent life sentences in Mr. Maree's case. (HT.78).

In response to cross-examination by Petitioner's attorney, Mr. Hasty stated that if Mr. Maree had not testified he would have tried his strongest case first, so if Maree had not agreed to testify, Maree would have been tried first, "if I had to try him." (HT. 110). Mr. Hasty stated that he had no independent recollection of telling Mr. Sparks that Maree would be tried first if he did not give his testimony because it was his strongest case. When asked by Petitioner's attorney whether Mr. Hasty would leave open the question of whether Maree would be tried or permitted to plead guilty if Maree testified for the state, Mr. Hasty replied, "I did not tell Mr. Sparks what I intended to do. (HT. 111).

The Supreme Court of Georgia directed that an evidentiary hearing to be held on the merits of this particular issue because the Court found that if the assertions set forth in an affidavit executed by former District Attorney Fred Hasty in May of 1982 were true, the facts presented "a serious constitutional issue of prosecutorial misconduct." Smith v. Zant, at 650. Therefore, the truth or falsity of the matters stated in the May 25, 1982 affidavit from former District Attorney Fred Hasty, were the subject of extensive testimony before this Court.

Essentially, Mr. Hasty testified before this Court that he was contacted by attorney Millard C. Farmer, on behalf of the attorneys representing John Eldon Smith, concerning the giving of an affidavit with reference to any agreement between the state and witness John Haree in exchange for his testimony against the Petitioner. This affidavit of Fred Hasty, dated May 25, 1982, had already been submitted at the prior hearing on the issue of waiver and was resubmitted by Petitioner's attorney as Petitioner's Exhibit No. 3 at the first evidentiary hearing before this Court. (HT. 22). Mr. Hasty's explanation for the discrepancy between the statements which he made to the jury in closing argument and the statement which he made in the affidavit which he signed on May 25, 1982, was as follows:

> Promises made - - I think that I testified on direct that my mind - - what I had intended to do and what I actually did over a period of time and the two trials had become merged in my mind, and at one time I had thought I had. But, I have gone back and having time to refresh my memory by looking at the record and having plenty of time to think through and trying to recall things that happened at this point, I know that I did not make any sort of promise to Mr. Morray (sic). I know that when I told

> the jury that no promises had been made that I was telling them the absolute truth because I have never mislead a jury. I know that if I had sat there and heard John Morray (sic) tell something that was not true, I know that I would - - I did not have him on direct examination, and I know that Don Thompson was working for me and I would have had Don Thompson straighten that out.

(HT. 87).

Mr. Hasty stated that if his memory had been refreshed as to what he had stated at the trial and as to John Maree's testimony at Petitioner's trial, he would have never given the affidavit. (T. 85). Mr. Hasty further stated that at no time was he shown any documents from Petitioner's trial which would conflict with what he was stating in the affidavit that he gave on May 25, 1982. (HT. 85). Mr. Hasty stated that he had not reviewed Petitioner's file at the time he made his affidavit and that he thought he was making a true statement when he signed the affidavit. (HT. 100-101). Concerning similar inconsistent statements relating to promises made to Maree given at a deposition taken with respect to Rebecca Machetti's habeas corpus action, Mr. Hasty stated that at the time he made the statements he thought that the statements were true, but after reviewing the file and the trial transcript, he knows that these statements given in the deposition were untrue. (HT. 93).

Ray Wilkes testified at the hearing before this court on June 13, 1983, and stated that at the time of Petitioner's trial in the Superior Court of Bibb County, he was the Chief Deputy for Bibb County and was involved in the investigation of the two murders with which Petitioner was charged. (HT., p. 2, 140). Sheriff Wilkes stated that he took a statement from John Maree, but made no promises to Mr. Maree with regard to the disposition of his case prior to Mr. Maree making this

statement. (HT. 140). Additionally, Sheriff Wilkes stated that he was present during numerous discussions with John Maree but that no promises were made to Maree during any of these discussions. (HT. II, 141).

CONCLUSION

This Court concludes that the transcript of Petitioner's trial accurately reflects the fact that state's witness Maree had made no agreement with the state in exchange for his testimony against the Petitioner, except protection for his family and himself because of threats. This Court concludes that at the time Petitioner testified at the trial of John Eldon Smith, who was tried first for the murders of Ronnie and Juanita Akins, Mr. Maree agreed to testify in light of the fact that he had given an extensive confession to the authorities admitting his participation in the crimes and partially due to the fact that he was in love with the daughter of Petitioner's wife and co-defendant, Rebecca Smith Machetti, and was afraid that if Mrs. Machetti was not convicted, she would do harm to her daughter. It was not the policy of the district attorney of Bibb County to make agreement with co-defendants prior to their testifying as state's witnesses. Although District Attorney Hasty had it in mind to recommend life sentences for Mr. Maree should he testify at both the trials of the Petitioner and Rebecca Smith Machetti, he never informed Mr. Sparks, who was representing Mr. Maree, or Mr. Maree, of his intention to make this disposition of the case. Prior to the time that Mr. Maree testified at Petitioner's trial, he had no expectation of the manner in which his case would be disposed. After the trial of Becky Machetti had begun, Mr. Maree stated that he wanted to go to trial himself and attempted to work out some agreement between himself and the state. However, no such agreement was reached prior to the time that Maree testified at the trial of Rebecca Smith Machetti.

Mr. Maree's attorney, Willis Sparks, had advised Petitioner that it would be in his best interest to testify for the state,

as he had already given a voluminous confession and as there was a possibility that the state would seek the death penalty, even though the evidence did not seem to indicate that Mr. Maree was the trigger man in the murders. It was based on this advice and Mr. Maree's feelings for Rebecca Smith Machetti's daughter that Mr. Maree testified at Petitioner's trial.

This Court has carefully reviewed the extensive evidence in the case, including both the testimony given at the evidentiary hearings and the documentary evidence presented to this Court, and finds as a matter of fact that there was no undisclosed agreement between the state and state's witness John Maree made to obtain Mr. Maree's testimony against the Petitioner. Petitioner has failed to present evidence to this Court which would establish that the testimony of Mr. Maree given at Petitioner's trial was in fact false and known to be false by the prosecution so as to establish a constitutional violation in light of Giglio v. United States, 405 U.S. 150 (1972) or Napue v. Illinois, 360 U.S. 264 (1959). Therefore, this Court concludes that Petitioner was not deprived of his right to a fair trial under due process principles.

This Court denies this petition for a writ of habeas corpus and dissolves any state of execution ordered by this Court.

SO ORDERED, This the 5 day of August, 1983.

SAM L. WHITMIRE
JUDGE, SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

APPENDIX G

In the Supreme Court of Georgia

Decided: AUG 16 1983

No. 2567. JOHN ELDON SMITH v. RALPH KEMP, SUPT.

PER CURIAM.

The trial court having entered findings of fact and conclusions of law, a copy of which is appended hereto and incorporated herein, which findings and conclusions adequately explain the decision of the trial court entered in accord with Smith v. Zant, 250 Ga. 645 (___SE2d___) (1983), the Application for Certificate of Probable Cause and the Motion for Stay of Execution are denied.

All the Justices concur.

APPENDIX H

FILED
at 10:50 A.M.
AUG 19 1983
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

JOHN ELDON SMITH,
Petitioner,

vs.

RALPH M. KEMP,
Respondent.

CIVIL ACTION NO. 83-298-1-MAC

OWENS, District Judge:

Under the legislatively enacted laws of the State of Georgia and the United States of America every person convicted in a state court of a crime has a right to attack the constitutional validity of his conviction by direct appeal and habeas petition in the courts of this State and then by habeas petition in the courts of these United States. Since John Eldon Smith was convicted on January 30, 1975, of the shotgun slayings of his wife's former husband and second wife and sentenced to die, he has pursued each of those time-consuming steps without success. Round one of his efforts began with his appeal to the Supreme Court of Georgia immediately after conviction and ended with affirmance of his conviction and sentence by the United States Court of Appeals for the Fifth Circuit on November 2, 1981, 660 F.2d 573 and 671 F.2d 858, cert. denied, ___ U.S. ___, 103 S.Ct. 181 (Oct. 5, 1982). His conviction and sentence of death remained undisturbed.

Round two began on June 25, 1982, in the Superior Court of Butts County and ended with the denial of further habeas relief by that court, and denial of a certificate of probable cause by

the Supreme Court of Georgia on Tuesday, August 16, 1983. With an execution date of Thursday, August 25, 1983, already fixed by order of the Superior Court of Bibb County, petitioner then came immediately to this United States District Court and filed his 28 U.S.C. § 2254 petition for habeas corpus relief and a motion for this court to stay the August 25, 1983, execution. With the superb cooperation of counsel for the petitioner and the State an expedited hearing was held in this court the evening of August 17; and a complete transcript of all prior proceedings was submitted. See, Barefoot v. Estelle, ___ U.S. ___, slip p. 13 (July 6, 1983). Everything has been carefully read and considered and petitioner's motion and petition are ready to be considered and decided.

ISSUES BEFORE THIS COURT

Petitioner urges this court to give consideration to two "round two" constitutional issues urged upon the Superior Court of Butts County and the Supreme Court of Georgia and at the direction of the Supreme Court of Georgia not heard and decided by the Superior Court of Butts County. Smith v. Zant, 250 Ga. 646, 301 S.E.2d 32 (March 1, 1983). The reasons given by the Supreme Court of Georgia for those issues — the alleged unconstitutional composition of the grand and petit jury lists and the alleged arbitrary, capricious, and racially discriminatory application of Georgia's death penalty statute — being now foreclosed, are in all respects valid and supported by decisions of the Supreme Court of the United States and the Fifth and Eleventh Circuit Courts of Appeals as to jury composition (see, Tennon v. Ricketts, 574 F.2d 1243 (5th Cir. 1978); Machetti v. Linahan, 679 F.2d 236, n.4 (11th Cir. 1982), citing Francis v. Henderson, 425 U.S. 536,

541-42, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976) and Stewart v. Ricketts, 451 F.Supp. 911, 913-14 (M.D. Ga. 1978)) and as to arbitrary, capricious, and racially discriminatory application of death penalty (see, Smith v. Balkcom 671 F.2d 858, 858-59 (5th Cir. 1982)(Unit B); O.C.G.A. § 9-14-51; Rule 9(b), Rules Governing Section 2254 Proceedings; Wainwright v. Sykes, 433 U.S. 72 (1977); Sanders v. United States, 373 U.S. 1, 15 (1963).

For the same reasons, consideration of those two issues is foreclosed in this court. See also Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982).

The issue that was presented and decided by the state habeas court and that must be considered and decided by this court is whether or not, pursuant to Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763, the prosecution made an undisclosed pretrial agreement with the principal witness against petitioner for the witness to be given life imprisonment in exchange for incriminating testimony against petitioner as to which the witness falsely testified and the prosecuting attorneys never disclosed to the court and jury. If so, Giglio is violated, and petitioner must be re-tried; if not, Giglio has not been violated and petitioner stands constitutionally convicted.

In Giglio a unanimous Supreme Court stated:

> "As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942). In Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959), we said, '[t]he same result obtains when the State, although

> not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269, 3 L.Ed.2d at 1221. Thereafter Brady v. Maryland, 373 U.S. at 87, 10 L.Ed.2d at 218, 83 S.Ct. 1194 (1963), held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Functions and the Defense Function § 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 3 L.Ed.2d at 1221. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 10 L.Ed.2d at 218. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' Napue, supra, at 271, 3 L.Ed.2d at 1222."

thereby stating that "deliberate deception of a court and jurors by the presentation of known false evidence . . ." or nondisclosure of evidence affecting credibility of a witness whose reliability may well be determinative of guilt or innocence constitute prosecutorial misconduct violative of the Constitution of the United States and requiring a new trial if the falsity or nondisclosure in any reasonable likelihood could have affected the jury's verdict.

Section 2254(d), 28 U.S.C., a law passed by Congress, specifies that the factual findings of the Superior Court of Butts County "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear. . ." that the state court proceeding was deficient in one of eight enumerated ways. In that statute it is specified that "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." Having examined each of said enumerated reasons for which the state court findings

may be disregarded by this court and, having examined the entire trial and habeas transcript in the light of the argument of counsel and Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722, 101 S.Ct. 764, this court finds that petitioner has failed to establish that any of the factual findings of the state court were erroneous. Those factual findings are thus presumptively correct and are to be used to determine whether or not a Giglio violation has been established.

The state habeas judge, after listening to and judging the credibility of every witness presented by petitioner or the State, made detailed findings of fact and then factually concluded:

> ". . . that at the time Petitioner testified at the trial of John Eldon Smith, who was tried first for the murders of Ronnie and Juanita Atkins, Mr. Maree agreed to testify in light of the fact that he had given an extensive confession to the authorities admitting his participation in the crimes and partially due to the fact that he was in love with the daughter of Petitioner's wife and co-defendant, Rebecca Smith Machetti, and was afraid that if Mrs. Machetti was not convicted, she would do harm to her daughter. It was not the policy of the district attorney of Bibb County to make agreement with co-defendants prior to their testifying as state's witnesses. Although District Attorney Hasty had it in mind to recommend life sentences for Mr. Maree should he testify at both the trials of the Petitioner and Rebecca Smith Machetti, he never informed Mr. Sparks, who was representing Mr. Maree, or Mr. Maree, of his intention to make this disposition of the case. Prior to the time that Mr. Maree testified at Petitioner's trial, he had no expectation of the manner in which his case would be disposed. After the trial of Becky Machetti had begun, Mr. Maree stated that he wanted to go to trial himself and attempted to work out some agreement between himself and the state. However, no such agreement was reached prior to the time that Maree testified at the trial of Rebecca Smith Machetti.
>
> "Mr. Maree's attorney, Willis Sparks, had advised Petitioner that it would be in his best interest to testify for the state, as he had already given a voluminous confession and as there was a possiblity that the state would seek the death penalty, even though the evidence did not seem to indicate that Mr. Maree was the trigger man in the murders. It was based on this advice and Mr. Maree's feelings for Rebecca Smith Machetti's daughter that Mr. Maree testified at Petitioner's trial.

"This Court has carefully reviewed the extensive evidence in the case, including both the testimony given at the evidentiary hearings and the documentary evidence presented to this Court, and finds as a matter of fact that there was no undisclosed agreement between the state and state's witness John Maree made to obtain Mr. Maree's testimony against the Petitioner. . . ." (emphasis added).

The petitioner alleges that John Maree falsely responded to the following questions asked on cross-examination by petitioner's attorney:

"Q. How many times have you talked to Mr. Ray Wilkes about this case?

A. Five or six times.

Q. How many times have you talked to Mr. Fred Hasty about it?

A. Possibly twice, I think, twice, yes, sir.

Q. How many times have you talked to Mr. Don Thompson who is connected with Mr. Hasty?

A. Once alone and with Mr. Wilkes being there and once with Mr. Hasty.

Q. At the time that you talked with Mr. Wilkes in exchange for your statement, were you promised anything?

A. The only thing that was promised to me was protection for my family and myself. There were threats involved in this thing.

Q. How about in respect to your liberties, your freedom?

A. Nothing has ever been said of that.

Q. Have you ever indicated to anyone that you expected to be out shortly?

A. No, sir."

Examined in light of the state habeas court's finding of fact, this court fails to perceive any proven falsity in the answers of the witness. As he stated, "the only thing that was promised to me was protection for my family and myself." That being the truth, there is no falsity to base a Giglio claim on.

Petitioner further argues that even accepting the state habeas findings of no promise there is still a Giglio violation. Petitioner points to the following portion of John Maree's testimony as found on pages 3 and 4 of said findings:

> "A. At the first trial, there was no question about testifying. I didn't have any real conversations regarding any kind of a deal whatsoever. Nothing came up on that until midway between the two trials; and, at that time, I stated that I wanted to go to trial myself. And Mr. Hasty stated that if I went to trial that he would have to step down from the case and turn it over to one of his assistants and they would go for the death penalty." (emphasis added).

and urges that said testimony establishes that the prosecution told the witness that if you don't testify and then plead guilty, you will be tried and the death penalty will be sought. They further urge that impliedly the prosecution thus said if you do testify and do plead guilty, the death penalty will not be sought. The difficulty with this contention is that it overlooks the next portion of John Maree's testimony as found by the state habeas court:

> "Q. When you speak of the two trials, do you have reference to the trial of John Eldon Smith, and then, Rebecca Smith Machetti"
> A. That is correct." (emphasis added).

which establishes that the threatening conversation occurred after petitioner's trial and before the second trial — Rebecca Smith Machetti — and could not possibly be relevant to the question of what John Maree was asked during petitioner's trial.

At the time John Maree testified against petitioner all that he had was a hope that if he cooperated by testifying, he would avoid the death penalty. Common sense would lead any juror to that conclusion. The prosecution in his closing argument dutifully

so stated to the jury. At that time he was possessed of no other information that would have possibly affected the credibility of John Maree. The prosecutor thereby fully complied with and did not violate the admonitions of Giglio. To conclude otherwise would require this federal habeas court to disregard the detailed findings of fact of the state habeas court without having seen, heard, and judged the credibility of all the witnesses. This court is not permitted to do so, and even if permitted could find no basis to do so. 28 U.S.C. 2254(d); Sumner v. Mata, 449 U.S. 539, 66 L.Ed.2d 722, 101 S.Ct. 764.

There is no possible merit to petitioner's claim that he should be granted habeas relief on account of a Giglio violation.

MOTION FOR A STAY OF EXECUTION —
CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Petitioner has been convicted and sentenced to die under a death sentence statute found by the Supreme Court of the United States in 1976 and again on June 22, 1983, to be constitutional in all respects. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909; Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235. In so finding the Supreme Court, among other things, stated in Gregg:

> ". . . capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.' Furman v. Georgia, supra, at 308, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Stewart, J., concurring).
>
> 'Retribution is no longer the dominant objective of the criminal law,' Williams v. New York, 337 U.S. 241, 248, 93 1337, 69 S.Ct. 1079 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Furman v. Georgia, 408 U.S., at 394-395, 33 L.Ed.2d 346, 92 S.Ct. 2726 (Burger, C.J., dissenting); id., at 452-454, 33 L.Ed.2d 346, 96 S.Ct. 2726 (Powell, J., dissenting); Powell v. Texas, 392 U.S. at 531, 535-536, 20 L.Ed.2d 1254, 88 S.Ct. 2145. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

Were there now any possible merit to the one constitutional issue that petitioner raises and that this court has also rejected, this court would not hesitate to stay the scheduled August 25, 1983, execution of petitioner to allow time for that issue to be

more extensively considered in this court and on appeal. There being, in this court's considered judgment, no possible merit to that issue, it is this court's duty to so state, to deny petitioner's motion to stay his execution, to deny a certificate of probable cause to appeal in forma pauperis, 28 U.S.C. § 2253, and to permit this "expression of the community's belief that [these murders] are themselves so grievous an affront to humanity that the only adequate response [is] the penalty of death" to be effected in the manner provided by the laws of this State.

SO ORDERED, this 19th day of August, 1983.

FILED
at 10:50 A.M.
AUG 19 1983
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

Wilbur D. Owens, Jr.
United States District Judge

O R D E R

Upon being advised of the entry of this order, counsel for petitioner moved the court for stay pending appeal. For reasons already stated, said motion is also DENIED.

SO ORDERED, this 19th day of August, 1983.

Wilbur D. Owens, Jr.
United States District Judge

RECEIVED
SEP 16 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No._____

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner/Applicant,

v.

JOHN ELDON SMITH,

Respondent.

APPLICATION TO VACATE THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING RESPONDENT A STAY OF EXECUTION

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
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THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT IMPROVIDENTLY REINSTATED A STAY OF EXECUTION FOR RESPONDENT JOHN ELDON SMITH IN LIGHT OF THIS COURT'S DECISION IN BAREFOOT V. ESTELLE, ___U.S.__ , 103 S.Ct. 3383 (1983). 16

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No._____

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner/Applicant,

v.

JOHN ELDON SMITH,

Respondent.

APPLICATION TO VACATE
THE ORDER OF THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT GRANTING RESPONDENT
A STAY OF EXECUTION

To The Honorable Lewis F. Powell, Jr., Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

COMES NOW, Petitioner-Applicant Ralph M. Kemp, Superintendent, Georgia Diagnostic and Classification Center, by and through counsel, Michael J. Bowers, Attorney General for the State of Georgia, pursuant to 28 U.S.C. § 2101 and makes the instant application for a writ directed to the United States Court of Appeals for the Eleventh Circuit, which writ would:

> (1) Order the United States Court of Appeals for the Eleventh Circuit to vacate, rescind, and dissolve its order of September 15, 1983, staying state prisoner John Eldon Smith's execution presently scheduled for September 21, 1983;

The reinstating of a stay of execution for Respondent John Eldon Smith pending the issuance of the mandate of the United States Court of Appeals for the Eleventh Circuit denies the State of Georgia its right to carry out a valid state sentence, a sentence which is scheduled to be carried out on September 21, 1983. Because the execution of John Eldon Smith is still scheduled for Sept. 21st,1983, subject to the stay of execution reinstated by the United States Court of Appeals for the Eleventh Circuit, Applicant respectfully requests that in the interests of justice due to all parties, this application be heard at this Court's earliest possible convenience.

The documents listed below were forwarded to this Court for its use in considering the previous application to vacate Respondent's stay of execution by Ralph M. Kemp, Application No. A-133. Petitioner respectfully requests that this Court consider these documents in considering the instant application to vacate the order of the United States Court of Appeals for the Eleventh Circuit reinstating a stay of execution for Respondent.

(1) The September 16, 1983 1982 SVB order of the Georgia Supreme Court remanding the issues raised by means of a successive habeas corpus petition filed in the Superior Court of Butts County to that Court for an evidentiary hearing;

(2) The November 3, 1982 order of the Superior Court of Butts County, Georgia with reference to Respondent's successive state habeas corpus petition;

(3) The transcript of the November 8, 1982 hearing in the Superior Court of Butts County;

(4) The November 15, 1982 order of the Superior Court of Butts County with reference to Respondent's successive state habeas corpus petition;

(5) The brief filed on behalf of Applicant Kemp in the Georgia Supreme Court in connection with the appeal from the denial of state habeas corpus relief to the Respondent, dated January 10, 1983;

(6) A copy of the decision of the Supreme Court of Georgia in Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983);

(7) The transcript of the May 10, 1983 hearing held in the Superior Court of Butts County with respect to Respondent's Giglio claims;

(8) The transcript of the June 13, 1983 hearing conducted in the Superior Court of Butts County with respect to Respondent's Giglio claim;

(9) The order of the Superior Court of Butts County dated May 25, 1983;

(10) The order of the Superior Court of Butts County dated August 5, 1983 finding Respondent's Giglio claim to be without merits;

(11) The application for certificate of probable cause to appeal from the judgment of the state habeas corpus court filed by Respondent to the Supreme Court of Georgia;

(12) The order of the Supreme Court of Georgia, dated August 16, 1983 accepting the findings of fact and conclusions of law of the state habeas corpus court;

(13) Petition for a writ of habeas corpus filed in the United States District Court for the Middle District of Georgia on August 17, 1983;

(14) Transcript of the August 17, 1983 hearing before United States District Judge Wilbur D. Owens;

(15) Answer-Response filed on behalf of the Applicant in the United States District Court for the Middle District of Georgia;

(16) Order of Judge Wilbur D. Owens dated August 18, 1983, denying Respondent's application for federal habeas relief, application for a stay of execution and application for a certificate of probable cause to appeal;

(17) Separate opinion of Judge Owens;

(18) Respondent's application for a stay of execution in the United States Court of Appeals for the Eleventh Circuit;

(19) Respondent's application for a certificate of probable cause filed in the United States Court of Appeals for the Eleventh Circuit;

(20) Respondent's brief in support of applications for a stay and certificate of probable cause to appeal in the United States Court of Appeals for the Eleventh Circuit;

(21) Applicant's brief in response to Respondent's applications for a stay of execution and certificate of probable cause to appeal in the United States Court of Appeals for the Eleventh Circuit.

With respect to this instant application to vacate the order of the Eleventh Circuit dated September 15, 1983, Petitioner requests that this Court consider these additional documents attached to this Application. These documents are as follows:

(22) The order of the Eleventh Circuit dated September 9, 1983 dissolving its previously entered stay of execution and affirming the judgment of the District Court denying Respondent federal habeas corpus relief.

(23) A motion for stay of execution filed in the Eleventh Circuit by Respondent on September 13, 1983.

(24) Response of Petitioner to Respondent's motion for a stay of execution filed on September 12, 1983.

(25) Suggestion for rehearing en banc filed in the Eleventh Circuit on September 13, 1983 by Respondent.

(26) The order of the Eleventh Circuit dated September 15, 1983 reinstating Respondent's stay of execution and ordering that the stay remain in effect until the mandate issue.

(27) The order of the Superior Court of Bibb County setting Respondent's execution date for September 21, 1983.

PART ONE

STATEMENT OF THE CASE

Respondent, John Eldon Smith, a/k/a Anthony Isalldo Machetti, was convicted of two counts of murder in the Superior Court of Bibb County on January 27-30, 1975. Having found the Respondent guilty of these murders, the jury found the presence of the statutory aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(4); Ga. Code Ann. § 27-2534.1(b)(4), i.e., that these murders had been committed for the purpose of receiving money or other things of monetary value. Having made this finding, a sentence of death was imposed on two counts of murder.

Briefly stated, Respondent's wife, Rebecca Akins Smith Machetti, the Respondent and a friend, John Maree, plotted the murder of Respondent's wife's former husband, with the intent of redeeming the proceeds of the former husband's insurance policies whose beneficiaries were Mrs. Machetti and her three daughters. (Trial transcript, p. 402-403; 411-413; 815; 835). Respondent was to share in the proceeds from the insurance policy with his wife and Mr. Maree was to profit by $1,000.00. (Trial transcript, p. 322-23; 325-26). There was also evidence that Respondent was motivated by the possibility of enhancing his reputation as a "hit man" in the underworld, due to the murders. (Trial transcript, p. 326-27). The murder of Joseph Ronald Akins and his new wife of 27 days, Juanita Knight Akins, occurred on August 31, 1974, as the result of shotgun wounds administered at close range. (Trial Transcript, p. 200, 220-222, 334-39, 341-42, 502).

On direct appeal to the Supreme Court of Georgia, Respondent's convictions and death sentences were upheld. Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), cert denied, 428 U.S. 910 (1976).

Next, Respondent initiated state habeas corpus proceedings in the Superior Court of Tattnall County, Georgia. An

evidentiary hearing was conducted on November 30, 1976. At this hearing, Respondent was represented by three attorneys and three witnesses, including Dr. Faye Goldberg and Mr. Hans Zeisel, testified in support of the allegations of the petition. Respondent did not testify in his own behalf at the hearing.

On March 14, 1977, the state habeas corpus court denied relief to the Respondent on all grounds raised in his petition. The Supreme Court of Georgia granted Respondent's application for a certificate of probable cause to appeal from the denial of habeas corpus relief. The Supreme Court of Georgia affirmed the judgment of the state habeas corpus court in Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), cert. denied, 436 U.S. 950 (1978).

Respondent, represented by counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division, on February 21, 1979. An order was signed by the district court allowing Respondent to proceed in forma pauperis on February 21, 1979 and a stay of execution was filed on the same date. An answer was filed on behalf of the Applicant in response to that petition on April 4, 1979.

By order of the district court dated April 21, 1980, Respondent's federal habeas corpus petition was referred to the United States Magistrate for the submission of proposed findings of fact and recommendations for disposition to the district judge. On September 9, 1980, the magistrate filed proposed Findings of Fact and Conclusions of Law and recommended that the petition for a writ of habeas corpus be denied. Respondent filed objections to the magistrate's proposed Findings of Fact and recommendations for disposition on October 20, 1980. On November 26, 1980, the district court, stating that it had carefully reviewed the magistrate's report and recommendation, adopted the report and recommendation as the opinion and order of the district court and denied

Respondent's habeas corpus petition. A motion for rehearing filed on behalf of the Respondent was denied by the district court on December 5, 1980.

Respondent, represented by counsel, appealed from the denial of federal habeas corpus relief to the United States Court of Appeals for the Fifth Circuit. Briefs were filed and oral argument was held in that court and the judgment of the district court denying federal habeas corpus relief was affirmed in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Respondent filed a petition for rehearing which was denied in a separate opinion issued by the United States Court of Appeals for the Fifth Circuit in Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982).

A stay of execution was granted by the United States Supreme Court on May 18, 1982, pending the filing of a petition for a writ of certiorari. The petition was filed on June 28, 1982, seeking review by the Supreme Court of the United States of the decision of the United States Court of Appeals for the Fifth Circuit. In his petition for a writ of certiorari, Respondent raised certain issues which were also later raised in his successive habeas corpus petition filed in the Superior Court of Butts County. The petition for a writ of certiorari was denied on October 4, 1982.

On June 25, 1982, a successive petition for a writ of habeas corpus was presented on behalf of Respondent in the Superior Court of Butts County, Georgia. The petition was dismissed without an opportunity for counsel for the Applicant to respond in any way to the allegations of the petition. Applicant presented the Superior Court of Butts County with a nunc pro tunc order withdrawing the court's initial order and declining to sanction the petition. Counsel for both parties filed applications for certificates of probable cause to appeal to the Supreme Court of Georgia. The Supreme Court of Georgia remanded this case to the lower court for an "evidentiary hearing" on the issues raised in Respondent's second state

habeas corpus petition. This order was read to the district court by counsel for the Respondent during a hearing on August 17, 1983.

The evidentiary hearing mandated by the Supreme Court of Georgia was scheduled for November 8, 1982. Following a prehearing conference, the Superior Court of Butts County determined that the scope of the hearing, as an initial matter, was to be limited to whether or not Respondent had waived the right to present the grounds raised in his second habeas corpus petition, and whether Respondent could reasonably have raised the grounds presented in his second habeas corpus petition, in his original habeas corpus petition. The Superior Court of Butts County specifically reserved the question of whether there would be a further evidentiary hearing on the merits of the allegations of the second habeas corpus petition.

Following a hearing on the issue of waiver, the Superior Court of Butts County entered an order, dated November 15, 1982, finding with respect to each of the issues raised in Respondent's second habeas corpus petition, that Respondent had failed to show that these issues were constitutionally non-waivable and that Respondent had failed to show that these issues could not reasonably been raised in his original habeas corpus petition which was filed in the Superior Court of Tattnall County, Georgia.

Respondent appealed these two orders of the Superior Court of Butts County to the Supreme Court of Georgia. In Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983), the Supreme Court of Georgia found that with respect to Respondent's allegation of an unconstitutionally composed jury that, "Petitioner has not shown grounds for raising this issue in his second habeas petition and the habeas court did not err in refusing to hear the matter on its merits." Smith v. Zant, supra at 647.

With respect to Respondent's claim that the death penalty statute in Georgia is being applied arbitrarily and discriminatorily, the Supreme Court of Georgia, noting that

this issue had been raised in Respondent's first state habeas as well as in his first federal habeas petition, found that:

> Now, in his successive state habeas, Smith seeks to bolster his claim of discriminatory application with preliminary analysis of a more recent study. Since, however, the ground has previously been raised and rejected, it is not cognizable in a successive petition under the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127), and was properly dismissed. If the rule were otherwise, a "new study" could be produced quarterly by another investigator using more detailed data to form the basis of yet another habeas petition.

Id. at 648.

However, the Supreme Court of Georgia remanded the case to the Superior Court of Butts County by stating the following:

> We, therefore, hold that Smith has alleged facts, supported by affidavits, sufficient to satisfy the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127) to entitle him to a hearing on the merits of his false testimony claim, i.e., Petitioner has shown grounds for relief which could not reasonably have been raised in his original habeas petition. The habeas court erred in dismissing Smith's Napue-Giglio claim and we remand this case for a hearing on the merits of this issue. (Cites omitted).

Id. at 652.

Pursuant to the decision of the Supreme Court of Georgia in Smith v. Zant, supra, two evidentiary hearings were held in May and June of 1983 on the merits of the Giglio claim.

On August 5, 1983, the Superior Court of Butts County entered an order finding that Respondent's allegation was without merit, i.e, that Respondent had failed to establish a "Napue-Giglio" claim and dissolved Respondent's stay of execution.

A notice of appeal and application for certificate of probable cause to appeal were filed in the Supreme Court of Georgia on August 12, 1983. On August 16, 1983, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal.

On August 17, 1983, Respondent filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and an application for a stay of execution in the United States District Court for the Middle District of Georgia, Macon Division. On that same date, a hearing was conducted before the district court and counsel for the Respondent and Applicant were allowed to present argument and/or evidence to the court for its review. After a two hour hearing before the district court, the district judge instructed counsel for both parties to present any further pleadings and/or documents to the court for its review by 5:00 p.m. on August 18, 1983. A complete record of all the prior proceedings described above was submitted to the district court for its consideration by counsel for both parties.

On August 19, 1983, the district court entered an order in which it found that consideration of two of Respondent's issues was foreclosed and that the third issue raised by the Respondent in his application for federal habeas corpus relief was without any "possible merit." In the district court's order of August 19, 1983, the district court not only denied Respondent federal habeas corpus relief, but also denied Respondent a certificate of probable cause to appeal in forma

pauperis and denied Respondent's motion to stay his execution. As the district court's order further notes, upon being advised of the entry of this order, counsel for the Respondent moved the district court for a stay pending appeal to the Eleventh Circuit Court of Appeals, but the motion was denied.

Also on August 19, 1983, Respondent filed a notice of appeal from the judgment of the district court. The filing, by Respondent on August 22, 1983, of an application for a certificate of probable cause to appeal and an application for a stay of execution, followed the filing of Respondent's notice of appeal. Respondent also filed an application for leave to proceed in forma pauperis in the United States Court of Appeals for the Eleventh Circuit. Applicant filed a response to the application for a stay of execution and the application for a certificate of probable cause to appeal.

At 5:00 p.m. on August 22, 1983, Counsel for Applicant was informed that the United States Court of Appeals for the Eleventh Circuit desired oral argument to be conducted on August 23, 1983 at 11:00 a.m. in the United States Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Oral argument was heard by the United States Court of Appeals for the Eleventh Circuit from 11:00 a.m. to 1:30 p.m. on August 23, 1983. At 4:25 p.m. on August 23, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order granting Respondent's motion for a stay of execution, granting Respondent's application for certificate of probable cause to appeal, granting Respondent's motion for leave to proceed in forma pauperis, and granting the motion of the Respondent to file out-of-size Appendices. An application to vacate the stay of execution granted to Respondent was denied by Mr. Justice Powell on September 14, 1983. Additional briefs were filed for Petitioner and Respondent on August 29, 1983, and August 30, 1983, respectively.

On September 9, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order dissolving the

previously entered stay of execution and affirming the judgment of the district court denying federal habeas corpus relief.

On September 13, 1983, Respondent John Eldon Smith filed a motion for a stay of execution until such time as the Eleventh Circuit ruled on the suggestion for rehearing en banc, said suggestion for rehearing en banc having also been filed on September 13, 1983. Petitioner filed a response opposing the granting of a motion for stay of execution on September 14, 1983.

On September 15, 1983, a panel of the United States Court of Appeals reinstated the stay of execution until such time as the mandate issues. This is the order which is the subject of the application now filed in this Court.

PART TWO

(i)

ISSUE PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit improvidently reinstated Respondent's stay of execution in light of this Court's decision in Barefoot v. Estelle, __ U.S.___, 103 S. Ct. 3383 (1983).

(ii)

RELIEF SOUGHT

That the order of the United States Court of Appeals for the Eleventh Circuit entered on September 15, 1983, reinstating Respondent's stay of execution be vacated, rescinded and dissolved in light of this Court's decision in Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983).

PART THREE

REASONS WHY THE APPLICATION SHOULD BE GRANTED AND THE WRIT ISSUE.

On September 9, 1983, the United States Court of Appeals for the Eleventh Circuit vacated the stay of execution previously granted to the Respondent and affirmed the judgment of the district court denying Respondent the relief sought by means of his successive federal habeas corpus petition. The stay of execution having been vacated, a new execution date for Respondent was scheduled for September 21, 1983. Counsel for Respondent filed a suggestion for rehearing en banc in the United States Court of Appeals for the Eleventh Circuit and a motion for a stay of execution pending the decision of the United States Court of Appeals for the Eleventh Circuit concerning the suggestion for rehearing en banc. Petitioner opposed the granting of a stay of execution.

On September 15, 1983, a panel of the United States Court of Appeals for the Eleventh Circuit reinstated the stay of execution previously granted to Respondent John Eldon Smith, said stay of execution to " . . . remain in effect until the mandate issues." The effect of this order reinstating Respondent's stay of execution is to grant an unlimited stay of execution to Respondent. The granting of such an unlimited stay of execution is not in accord with the expedited procedures envisioned by this Court in Barefoot v. Estelle, ____ U. S. ____, 103 S.Ct. 3383 (1983).

The reinstating of the stay of execution was improper under this Court's decision in Barefoot v. Estelle, supra, as the granting of the stay by a panel of the United States Court of Appeals for the Eleventh Circuit did not "reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, supra, at 3395. The granting of an

unlimited stay of execution without a showing that there were substantial grounds upon which relief might be granted as alleged in Respondent's successive petition for writ of habeas corpus is an abuse of discretion by the United States Court of Appeals for the Eleventh Circuit and denies the State the opportunity to carry out a validly imposed conviction and sentence.

PART FOUR

ARGUMENT AND CITATION OF AUTHORITY

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IMPROVIDENTLY REINSTATED THE STAY OF EXECUTION FOR RESPONDENT JOHN ELDON SMITH IN LIGHT OF THIS COURT'S DECISION IN BAREFOOT v. ESTELLE, ___U.S.___, 103 S.CT. 3383 (1983).

On September 9, 1983, the United States Court of Appeals for the Eleventh Circuit entered an extensive order, attached as an exhibit to this application, affirming the judgment of the district court and vacating the stay of execution previously granted to Respondent John Eldon Smith. In the order the United States Court of Appeals for the Eleventh Circuit noted the following:

> In these appeals and petitions, a total of 28 jurists on seven separate state and federal courts, some on several occasions (The Supreme Court of the United States has been petitioned four times, the Georgia Supreme Court five), have considered Smith's claims. He has sought procedural devices (stays of execution and full hearings) to insure that his claims be fully developed and considered as well as relief on their merits. He has been provided most of the procedural protections sought. No court has found merit in any of his claims.

(Emphasis supplied). (Decision of the Eleventh Circuit, p. 6-7).

With respect to the alleged Giglio violation, the Eleventh Circuit found that the state court's findings of fact were amply supported by the evidence and that under the facts of this case, no Giglio violation occurred. (Eleventh Circuit order, p. 16). With respect to Respondent's contention that the Georgia death penalty statute is arbitrarily and discriminatorily imposed, the Eleventh Circuit found that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts "precludes consideration of the merits of Petitioner's argument in this successive petition." (Order of Eleventh Circuit, p. 20). With respect to Respondent's attack on the constitutionality of the grand and petit juries, the Eleventh Circuit found, "We thus hold that Smith has not shown that the federal court could consider the merits of this claim under the existing legal authorities." (Decision of the Eleventh Circuit, p. 29).

After the decision of the Eleventh Circuit was entered and the stay of execution previously granted to the Respondent was dissolved, a new execution date was set for the Respondent, said execution being set for September 21, 1983. A copy of the order of the Superior Court of Bibb County setting this execution date is attached for this Court's review. Counsel for Respondent then filed a suggestion for rehearing en banc in the United States Court of Appeals for the Eleventh Circuit and also filed a motion for a stay of execution pending consideration of his suggestion for rehearing en banc. No decision has yet been reached on the suggestion for rehearing en banc. Instead, the panel which rejected Respondent's claims raised by means of a successive federal habeas corpus petition found that as the mandate had not issued, the stay of execution should be reinstated and should remain in effect until the issuance of the mandate. A copy of the order of the panel dated September 15, 1983 is attached to this application for this Court's review.

The effect of the order entered by the United States Court of Appeals for the Eleventh Circuit on September 15, 1983, is to grant an unlimited stay of execution to the Respondent as the only factor serving to dissolve the stay of execution will be the issuance of the mandate by the United States Court of Appeals for the Eleventh Circuit. Assuming that a suggestion for rehearing en banc is denied, counsel for Respondent can prevent the issuance of the mandate by filing timely pleadings in the United States Court of Appeals for the Eleventh Circuit to stay the mandate pending a petition for a writ of certiorari to this Court and can also prevent the issuance of the mandate by filing a petition for a writ of certiorari in this Court. This unlimited stay of execution granted by the Eleventh Circuit to a state prisoner filing a successive federal habeas corpus petition, is an abuse of discretion by that court and is in conflict with the guidelines set forth by this Court in Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983).

The order of September 15, 1983 of the United States Court of Appeals for the Eleventh Circuit does not "reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, supra at 3395. Additionally, the order of the United States Court of Appeals for the Eleventh Circuit reinstating Respondent's stay of execution does not reflect that the stay was reinstated due to the presence of substantial grounds upon which relief might be granted. Id.at 3395. Nor does the unlimited stay of execution granted to the Respondent by means of the Eleventh Circuit's order of September 15, 1983 comport with the expeditious consideration of successive federal habeas corpus petitions envisioned by this Court. Id.

Further, the decision of the United States Court of Appeals for the Eleventh Circuit automatically reinstating Respondent's stay of execution is in conflict with that portion of this Court's decision in Barefoot v. Estelle, in which this Court

stated, "stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals that has denied a writ of habeas corpus." Id. at 3395. While not attempting to predict the decision which may be reached by the United States Court of Appeals for the Eleventh Circuit with respect to the suggestion for rehearing en banc filed by the Respondent, Petitioner submits that the impact of the Eleventh Circuit's order of September 15, 1983 granting Respondent a stay of execution until the issuance of the mandate by that court, is to grant Respondent an automatic stay of execution pending the filing of his petition for certiorari, should he be unsuccessful in having the Eleventh Circuit grant the suggestion for rehearing en banc.

This unlimited delay in the review of the claims raised by Respondent in this successive federal habeas corpus petition, in light of the extensive review that Respondent's convictions and sentences have received, discussed in the statement of the case portion of this application, is an abuse of discretion. This is especially true, where as here, the unlimited stay of execution has been granted to Respondent when the Eleventh Circuit itself notes that "no court" has found merit in any of Appellant's claims; when the United States Court of Appeals for the Eleventh Circuit has found no merit to any of Appellant's claims; when Mr. Justice Powell has indicated that, "it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration," and when the full court of the United States Court of Appeals for the Eleventh Circuit has not indicated whether the issues raised by Respondent in his successive federal habeas corpus petition merit review by the full court in light of Barefoot v. Estelle, supra.

CONCLUSION

The unlimited stay of execution granted to Respondent by the United States Court of Appeals for the Eleventh Circuit in the panel decision of September 15, 1983 is an abuse of the Eleventh Circuit's discretion and violates the principles of this Court in Barefoot v. Estelle, supra, which decision contemplates that issues raised by means of a successive federal habeas corpus petition shall be considered in an expedited manner and that no stay of execution shall be granted unless such a petition reflects the presence of substantial grounds upon which relief might be granted. For these reasons, Petitioner prays that this Court grant this application and issue a writ directing that the United States Court of Appeals for the Eleventh Circuit vacate, rescind and dissolve its stay of execution entered on September 15, 1983 with respect to Respondent, state prisoner John Eldon Smith, so as to allow the execution of John Eldon Smith to be carried out as scheduled.

Respectfully submitted,

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Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon
MARION O. GORDON
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Please serve:

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Petitioner/Applicant, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Application to Vacate the Order of the United States Court of Appeals for the Eleventh Circuit Granting Respondent a Stay of Execution upon Respondent's attorney bu personally delivering a copy of the same to the American Civil Liberties Union on behalf of John Charles Boger and at his direction on September 15, 1983 at 7:12 o'clock, p m. and by depositing a copy of same in the United States Mail with proper address and adequate postage to:

Jack Greenburg
Jack M. Nabritt, III
Steven L. Winter
10 Columbus Circle
New York, New York 10010

Timothy K. Ford
600 Pioneer Building
Seattle, Washington 90104

Robert C. Glustrom
116 East Howard Avenue
Decatur, Georgia 3003

Anthony G. Amsterdam
New York University of Law School
40 Washington Square, South
New York, New York 10012

This 15th day of September, 1983.

Susan V. Boleyn
SUSAN V. BOLEYN

IN THE SUPERIOR COURT OF BIBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
V.	*	INDICTMENT NO. 16107
	*	MURDER (2 Counts)
JOHN ELDON SMITH, a/k/a ANTHONY ISALLDO MACHETTI, a/k/a TONY MACHETTI.	*	

ORDER

The Court having sentenced the defendant, John Eldon Smith on the 30th day of January, 1975, to be executed by the Department of Offender Rehabilitation at such penal institution as may be designated by said Department, in accordance with the laws of Georgia, and;

The date for the execution of the said John Eldon Smith having passed by reason of a supersedeas incident to appellate and collateral review;

IT IS CONSIDERED, ORDERED AND ADJUDGED by this Court that on the 21st day of September, 1983, the defendant, John Eldon Smith, shall be executed by the Department of Offender Rehabilitation at such penal institution as may be designated by said Department all in accordance with the laws of Georgia.

The Clerk is directed to serve a copy of this Order upon the Commissioner of the Department of Offender Rehabilitation, the Warden of the Georgia Diagnostic and Classification Center, Jackson Georgia, the Attorney General for the State of Georgia, the District Attorney, the Defendant, and last known counsel of record for the Defendant.

This 9th day of September, 1983.

FILED IN OFFICE
9th day of Sept 1983
Deputy Clerk

C. Cloud Morgan
Judge, Superior Court
Macon Judicial Circuit

I hereby certify that this document is a true and correct copy of the original as the same appears of file and record in this office.
Date: 9-9-83

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-8611

PUBLISH

JOHN ELDON SMITH,

Petitioner-Appellant,

versus

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(September 9, 1983)

- PETITIONER'S EXHIBIT NO. 22 -

Before RONEY, HILL and HATCHETT, Circuit Judges.

RONEY and HILL, Circuit Judges:

Joseph Ronald Akins and his wife of twenty days, Juanita Knight Akins, were killed in a secluded area of a new housing development in Bibb County, Georgia, on August 31, 1974, by shotgun blasts fired at close range. Petitioner, John Eldon Smith, also known as Tony Machetti, charged with firing the shotgun, was convicted of murder and sentenced to death.

Briefly, the evidence was that petitioner and his wife, Rebecca Akins Smith Machetti, together with John Maree, plotted to kill Akins, a former husband of Rebecca's and the father of her three children, in order to collect his life insurance proceeds. John Maree testified that he and petitioner lured Akins to the area of the crime on the pretense of installing a television antenna. When Akins appeared with his wife, petitioner shot them both.

Before this Court is the appeal from a denial of a second federal habeas corpus petition that asserted three grounds for relief: first, John Maree had a pretrial agreement or understanding not revealed to the jury so that the trial was unconstitutional under Giglio v. United States, 405 U.S. 150 (1972); second, the Georgia death statute is applied in an

unconstitutional, arbitrary, and discriminatory way; and third, the underrepresentation of women made the jury that convicted him unconstitutional under Taylor v. Louisiana, 419 U.S. 522 (1975).

We affirm the denial of habeas corpus relief holding first, the Giglio claim, although not asserted in the prior federal habeas corpus proceeding, was resolved by a state court's findings of fact that there was no understanding or agreement that should have been revealed to the jury; second, that defendant had a full opportunity to litigate and did litigate in his prior habeas corpus proceeding the issue concerning the arbitrary and discriminatory application of Georgia's death penalty to petitioner, so that the attempt to relitigate here is a clear abuse of the writ; and third, the defendant waived his right to object to the jury by failing to assert the issue at trial, on appeal, or on his first habeas corpus proceeding.

Petitioner's execution was scheduled for August 25, 1983. A notice of appeal was filed in this Court on Monday, August 22, from a denial of the relief by the district court entered on Friday, August 19. A motion for stay of execution was simultaneously filed, along with a motion for certificate of probable cause, denied by the district court.

Following the procedures indicated by Barefoot v. Estelle, _____ U.S. _____, 103 S.Ct. 3383 (1983), this Court gave proper notice that the Court would consider the merits as well as the

pending motion and heard two and one-half hours of oral argument on Tuesday, August 23. The parties cooperated by filing excellent briefs and thoroughly arguing all issues raised in this appeal. The Court entered a stay, in order to more thoroughly examine the issues presented, and called for additional briefs to be filed by August 29. Supreme Court Justice Powell refused to vacate the stay. Our decision here reflects the full consideration of the merits of the case based on the record from the trial and both habeas corpus proceedings, voluminous briefing at the trial and appellate stage, extensive oral argument, and the Court's independent research on the legal issues involved.

To understand our decision, insofar as it relates to the abuse of the writ and the waiver issues, it is helpful to review a chronology of the prior proceedings in this case:

Jan. 30, 1975	Petitioner convicted.
Feb. 1975	Rebecca Smith Machetti convicted.
Jan. 6, 1976	Conviction & sentences aff'd - Smith v. State, 236 Ga. 12, 222 S.Ed.2d 308 (1976).1/
July 6, 1976	Cert. denied, Smith v. Georgia, 428 U.S. 910 (1976).
Oct. 4, 1976	Petition for rehearing denied, Smith v. Georgia, 429 U.S. 874 (1976).
Oct. 22, 1976	Petition for Writ of Habeas Corpus - Georgia Superior Court
Mar. 16, 1977	Petition dismissed (unpublished order)
Oct. 18, 1977	Affirmed order dismissing, Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977).2/

June 5, 1978	Cert. denied, Smith v. Hopper, 436 U.S. 950 (1978).
Oct. 2, 1978	Petition for rehearing denied, Smith v. Hopper, 439 U.S. 884 (1978).
Feb. 21, 1979	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Sept. 9, 1980	U.S. Magistrate recommended denial of all relief.
Nov. 26, 1980	District court denied relief (unreported order and judgment).
Nov. 2, 1981	This Court affirmed, Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981).[3/]
Mar. 29, 1982	Opinion Modified on Rehearing, 671 F.2d 858 (5th Cir. Unit B 1982).
Oct. 5, 1982	Cert. denied, Smith v. Balkcom, 103 S.Ct. 181 (1982).
June 25, 1982	Second Petition for Writ of Habeas Corpus filed in Georgia Superior Court.
	Georgia Superior Court dismissed immediately without consideration of the merits.
Sept.16, 1982	Georgia Supreme Court remanded appeal "for an evidentiary hearing on the issues raised in the Petition."
Nov. 15, 1982	Superior Court on remand (after brief hearing on waiver issues) denied evidentiary hearing on merits and dismissed.
Mar. 1, 1983	Georgia Supreme Court reversed and remanded case again for evidentiary hearing on prosecutorial claim of misconduct. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983).
May 10, 1983 June 10, 1983	Evidentiary hearings before Superior Court.
Aug. 5, 1983	Superior Court's order denying relief.

Aug. 16, 1983	Georgia Supreme Court denied application for CPC.
Aug. 17, 1983	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Aug. 17, 1983	Oral Argument before District Court.
Aug. 18, 1983	Petitioner's motion for an evidentiary hearing.
Aug. 19, 1983	Order denying motion. Order dismissing petition, denying CPC, denying IFP and denying stay of execution pending appeal.
Aug. 19, 1983	Notice of Appeal (USCA, 11th Cir.).
Aug. 22, 1983	Application for CPC, IFP and certificate of good faith and application for stay of execution.
Aug. 23, 1983	Oral Argument and Order granting CPC, IFP, and stay of execution.
Aug. 24, 1983	Motion to Vacate Stay applied to Justice Powell.
Aug. 24, 1983	Justice Powell's Order declining to vacate stay.
Aug. 25, 1983	Court's letter to counsel to file other material by August 29.

In these appeals and petitions, a total of 28 jurists on seven separate state and federal courts, some on several occasions (the Supreme Court of the United States has been petitioned four times, the Georgia Supreme Court five), have considered Smith's claims. He has sought procedural devices (stays of execution and full hearings) to insure that his claims be fully developed and

considered as well as relief on their merits. He has been provided most of the procedural protections sought. No court has found merit in any of his claims.

I. Alleged Giglio Violation.

The petitioner did not raise the claimed Giglio violation until his second state habeas corpus petition. At the insistence of the Supreme Court of Georgia on its second remand of that petition to the state habeas corpus judge, a hearing was held on petitioner's claim that the prosecution failed to correct the false testimony of John Maree, an accomplice and eyewitness who testified against Smith at the latter's trial, that Maree had no plea agreement with the state. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983). Prosecutorial suppression of an agreement with or promise to a material witness in exchange for that witness' testimony violates a criminal defendant's due process rights. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony.

Maree testified on cross examination that he had never received any promises in exchange for his testimony other than "protection for my family and myself." Smith alleges that Maree had received a promise of a life sentence in exchange for testimony against petitioner and that the prosecutor concealed this promise from the jury.

On remand, the issue before the state habeas court centered upon the existence, vel non, of such a promise to, or

agreement with, witness Maree. After what we find to have been a full and fair hearing, the state judge found, as a fact, that there had been no such promise or agreement.

The hearing was extensive. While the issue was first joined upon exhibits of sworn statements of Fred Hasty, the District Attorney who had prosecuted petitioner and a contradictory affidavit of witness Maree, it was not confined to that. Hasty was called and testified, in person, before the court. Indeed, every person in life who was suggested as having knowledge of the alleged deal appeared, in person, and gave testimony on direct and cross examination.

Hasty denied that he had extended any promise to, or made any agreement with, witness Maree. He acknowledged that he had given prior contradictory sworn statements. In explaining the contradiction between his live testimony at the state habeas hearing and both the sworn statement in a deposition he gave in Becky Machetti's case and an affidavit he gave to Millard Farmer on behalf of appellant's counsel, Hasty testified that he thought the latter statements were true when he gave those statements, but after reviewing his file and the transcript of appellant's trial, Hasty realized that these statements were not true. Transcript of May 10, 1983 hearing at 88-89, 93. Hasty explained that when he gave those statements, he had not reviewed his file or the transcript. Transcript of May 10, 1983 hearing at 100-101. Hasty testified that at the time of Smith's trial, he knew what he was going to do with reference to the case pending against

John Maree, if Maree testified, but did not discuss this with Mr. Sparks. Transcript of May 10, 1983 hearing at 77.

The sworn testimony of every live witness who testified at the state habeas hearing contradicts Hasty's two affidavits. Willis Sparks, who represented Maree on the murder charge in 1974, testified that he had asked then District Attorney Hasty "point-blank" what Maree would receive from the prosecution in return for his testimony. Sparks swore that Hasty had steadfastly replied that the prosecutor would make no agreement with a co-defendant before trial because that was not his practice. Sparks further testified that Assistant District Attorney Thompson had never made any promise to Maree and that no one from either the Bibb County district attorney's office or sheriff's department had ever made any promises to Sparks as Maree's attorney. Sparks testified that he had recommended to Maree that the latter testify because Maree had already made a valid confession. Sparks had also noted that the confession had been corroborated by Maree's palm print found in the victim's car and that the state could and might well seek the death penalty against Maree.4/

Bibb County Sheriff Ray Wilkes stated that he was Chief Deputy of Bibb County when petitioner was tried and that no member of the sheriff's office made any promises to Maree.

Although the state habeas judge had before him the affidavit of Maree, then serving a life sentence, petitioner urged that Maree should appear and testify under cross examination. The state offered to produce Maree and the hearing was adjourned

to a date for his appearance. On June 13, 1983, one month after the initial hearing, he was produced, sworn, and testified. His testimoney was unequivocal. Maree testified that "at the first trial, there was no question about testifying. I didn't have any real conversation regarding any kind of a deal whatsoever." Transcript of June 13, 1983 hearing at 10. Maree unequivocally stated that he had had no discussions with Hasty concerning a life sentence in exchange for his testimony at Smith's murder trial. Id. Maree also stated at the state habeas hearing that he had testified at Smith's trial on advice of his counsel Sparks who had concluded that it was in Maree's best interest, under all the circumstances, to give full truthful testimony.

If the state habeas court afforded petitioner a full and fair hearing, we, as a federal habeas court, must apply a presumption of correctness to the state court's written factual findings. Sumner v. Mata, 449 U.S. 539 (1981); 28 U.S.C. §2254 (d). Petitioner must rebut this presumption by establishing by convincing evidence that the state court's findings are erroneous. Sumner v. Mata, 449 U.S. at 546; Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983).

The state court's findings of fact are amply supported by the evidence. Although Hasty's testimony was subject to the impeachment inherent in his prior sworn statements (which as sworn affidavits, constituted evidence of the facts stated in them), the state habeas judge found that there had been no promise made to, or agreement made with, witness Maree. In so finding,

the judge found in accordance with all the sworn testimony taken from all the witnesses who appeared before him. To have found to the contrary would have required a finding that each and every witness who knew the facts had lied in their testimony given at the hearing.

Resolution of conflicts in evidence and credibility issues rests within the province of the state habeas court, provided petitioner has been afforded the opportunity to a full and fair hearing. 28 U.S.C. §2254 (d) does not give federal habeas courts "license to redetermine credibility of witnesses whose demeanor has been observed by the state . . . court, but not by them." Marshall v. Lonberger, 103 S.Ct. 843, 851 (1983). The state court's finding that there was no agreement between Maree and the prosecution is "fairly supported by the record." See 28 U.S.C. §2254 (d) (8). Petitioner has not satisfied his burden of proving by convincing evidence that this finding was erroneous.

Petitioner asserts that the state habeas hearing was not full and fair. He first asserts that the hearing was flawed because, at that hearing, Hasty was represented by private counsel and representatives of the State Bar of Georgia were present. Petitioner's assertions that Hasty had made a "deal" with witness Maree and had abided its concealment at petitioner's trial had attracted the bar's attention. Such conduct might well constitute unethical conduct. Petitioner does not contend that the presence

of the bar investigators or Hasty's counsel prevented petitioner from presenting any evidence or argument or otherwise fully developing his claim.

As we view the record, the impact, if any, of the pendency of state bar proceedings against Hasty aided petitioner. The state habeas court was certainly aware of the presence of the bar investigators. The fact that Hasty was subject to such proceedings would tend to impeach his testimony at the hearing, to petitioner's benefit. The presence of his private counsel, retained in connection with the disciplinary matter, and the presence of the bar representatives presented motivation to Hasty to exonerate himself most dramatically. It would have been material to petitioner's attack upon Hasty's testimony to have proven the coincident disciplinary proceedings. They were shown to the state court more effectively than petitioner could have been expected to prove.

Attorney Millard Farmer, said to have been doing "leg work" for petitioner's attorneys, had taken the affidavit from Hasty offered in support of petitioner's claim. After concluding the second hearing, at which Hasty had denied the correctness of the affidavit and had sworn that he had been assured by Farmer that he would have an opportunity to correct it, the state judge allowed petitioner additional time to produce Farmer as a witness,

live or by deposition. Transcript of June 13, 1983 hearing at 144-45. Petitioner chose, instead, to file Farmer's affidavit.

Petitioner argues that the state habeas hearing was faulty in that he was not allowed to subpoena and inspect the confidential record of the Georgia State Pardon and Parole Board concerning witness Maree. Georgia law provides that these files remain confidential. O.C.G.A. § 42-9-53. It is suggested that such a record might contain some support for the contention that, before petitioner's trial, a promise had been made to Maree. At the district court's direction this file, sealed, was provided to the district judge who examined it in camera. It is a part of the record before us. We have examined it. It offers no support for that proposition.

Petitioner asserts that the state hearing was less than full and fair in that the state court refused to admit testimony from proffered witness Reverend Murphy Davis. This witness offered to state that long after petitioner's trial, Davis had participated in a debate with former Assistant Bibb County District Attorney Donald Thompson as to the propriety, vel non, of the death penalty and that at that debate, Thompson had stated that it was necessary for Maree to be let off with a life sentence in order to obtain evidence against petitioner and Rebecca Machetti. Petitioner offered Davis' testimony to prove the truth of Thompson's statement. Thompson pre-deceased these proceedings. Aside from the insufficiency of what Thompson is alleged to have said to

prove the existence of a pretrial deal with witness Maree, this evidence was offered to prove the truth of the matter therein and constituted inadmissible hearsay. The state judge permitted petitioner to proffer the testimony of Rev. Davis in the form of a direct examination of Davis.

We conclude that the state habeas court afforded petitioner a full and fair hearing on this contention. All witnesses desired by petitioner were produced even where adjournment was required for their production. No admissible evidence offered by petitioner was excluded. The finding that there was not a pretrial agreement or promise to Maree was supported by all the sworn testimony and it was substantial. Absent a deal or promise, there was no Giglio violation arising from the failure of the prosecution to reveal one.

Petitioner alternatively asserts that the prosecution presented a threat against witness Maree and that failure to reveal this threat to the jury violated Giglio v. United States, supra. In pretrial discussions with Maree and his counsel, Sparks, the prosecutor had outlined Maree's position. Maree had confessed to the murders. His confession gave the prosecutor a better case against Maree than the state possessed against Maree's co-indictees. The nature of the crime made the death penalty available.

Nothing stated to Maree was concealed from the jury. Maree's testimony at trial made it abundantly clear that he was subject to prosecution. The jury knew that. No one concealed from the jury that Maree hoped, by testifying, that he might

escape the death penalty. If that was not apparent from Maree's testimony, the prosecutor made it clear to the jury when he said, in closing argument

> I want to tell you one other thing.... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise.

The threatened position of Maree was clear to the jury. He was subject to prosecution on two counts of murder (He was so prosecuted); the district attorney intended to obtain convictions on both counts (He did); Maree was hoping to avoid the death penalty (He did); but no promise had been made to him.

The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir. 1978); see United States v. Meinster, 619 F.2d 1041, 1044-45

(4th Cir. 1980) (Intent of Giglio "is not to punish the prosecutor; rather the primary concern is that the jury not be misled by the prosecution's knowing use of perjured testimony."); United States v. Barham, 595 F.2d 231, 243 (5th Cir. 1979).

In this case Maree's fears and aspirations were clear. The jury was made aware of Maree's situation and could test his credibility taking his threatened posture into consideration. Under the facts of this case, no Giglio violation occurred.

II. Appellant's Contention that Georgia Death Penalty Statute Is Arbitrarily And Discriminatorily Imposed.

In this successive habeas corpus petition, petitioner asserts that the death penalty in Georgia is arbitrarily and discriminatorily imposed. Smith unsuccessfully raised this same claim in his first federal habeas corpus petition. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, _____ U.S., _____, 103 S.Ct. 181 (1982). Appellant admits that the issue raised in this petition is the same claim which was previously decided adversely to him but asserts that he now has additional evidence which he could not have presented the first time this court adjudicated this issue. Alternatively, petitioner contends that this court altered the standard by which we adjudicate claims of discriminatory application of the death penalty in Georgia.

Rule 9(b) of the Rules governing §2254 cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert these grounds in a prior petition constituted an abuse of the writ.

Appellant correctly notes that a denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7 (1963). Rule 9(b) codifies the seminal case of Sanders and preserves existing case law with respect to abuse of the writ. Advisory Committee Note, Rule 9, Rules Governing Section 2254 cases in the United States District Courts (28 U.S.C.A. Foll. §2254); Potts v. Zant, 638 F.2d 727, 739 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981).

> In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal habeas court will adjudicate at least once the claims of a petitioner.

Potts v. Zant, 638 F.2d at 738.

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court held that a federal court may give

> controlling weight . . . to denial of a prior application for federal habeas . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to

> the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. In determining whether the "ends of justice" would be served by readdressing the merits of the same contention as raised in the prior petition, we must look at objective factors, such as whether this was a full and fair hearing with respect to the first petition and whether there has been an intervening change in the law. Id. at 16-17; Potts v. Zant, 638 F.2d at 739.

In the case at bar, Smith concedes that his argument regarding the alleged discriminatory application of Georgia's death penalty statute presents the same claim that was determined adversely to the applicant in the prior adjudication. No party disputes that the prior determination was on the merits. See Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, ____ U.S. ____, 103 S.Ct. 181 (1982). We must therefore determine whether a new adjudication of the merits of petitioner's argument would serve the ends of justice. We conclude that it would not.

Petitioner bears the burden of showing that the ends of justice would be served by a redetermination. Sanders v. United States, 373 U.S. at 17. Appellant has not alleged that the initial hearing on this issue was not full and fair. See id. at

16-17. Smith cannot assert that the denial of the earlier petition constituted plain error. See Bailey v. Oliver, 695 F.2d 1323, 1325-26 (11th Cir. 1983). Petitioner asserts, however, that the panel's modification of its original opinion constituted a change in the law justifying his failure to raise a crucial point by presenting evidence of discriminatory impact. See Sanders v. United States, 373 U.S. at 16-17. This assertion lacks merit.

The modification of our opinion in the earlier adjudication of petitioner's contention, Smith v. Balkcom, 671 F.2d at 859, did not alter the requirement that a petitioner prove intentional discrimination. Our earlier opinion, 660 F.2d 573, 585 (5th Cir. Unit B 1981), implied that the court would never find intentional or purposeful discrimination from circumstantial proof or proof of racially disproportionate impact. The modified opinion acknowledge that under long existing precedent, in certain instances, "statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose." Smith v. Balkcom, 671 F.2d at 859 (citing Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 266 (1977) and Furman v. Georgia, 408 U.S. 238, 389 n.12 (1972) (Burger, C.J., dissenting)). That is the proposition upon which Smith proceeded in his first habeas petition and our opinion worked no change in that proposition. Neither the original panel opinion nor the modification undertook to declare what

evidence would prove purposeful discrimination by a state; they merely pointed up some shortcomings in the evidence petitioner offered to support his claim. There was no remand. The issue having been fully and fairly presented by petitioner in this first habeas petition was finally decided.

Petitioner's attempt to present "new evidence" in his second petition merely seeks to introduce a modified and expanded version of statistics already rejected by this court in adjudicating the merits of the prior petition. In this successive habeas petition, Smith offers additional conclusions said to be drawn from the same records that were available to him when this identical assertion was made and adjudicated by the several courts which passed upon it. To entertain such piecemeal submissions would not serve the ends of justice but would allow prisoners to file nuisance and vexatious petitions. To allow Smith to reassert this claim would allow any unsuccessful habeas petitioner to file additional successive applications by keeping teams of aides at work studying the same data and proffering additional arguments and conclusions derived from and based upon the ongoing study. That is precisely what Rule 9(b) prohibits. Without a further showing of how the ends of justice would be served by considering Smith's reassertion of the same discrimination claim, Rule 9(b) precludes consideration of the merits of petitioner's argument in this successive petition.

III. Constitutionality of Jury.

Smith made no challenge to the jury because of the underrepresentation of women at or before trial. The Georgia procedural rule requires that a defendant's challenge to jury composition be made at or before the time the jury is "put upon him". O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. Smith also failed to raise the jury composition issue on direct appeal to the Georgia Supreme Court, in his initial state habeas corpus action, or in his initial federal habeas corpus petition. Smith's wife, however, while not raising the issue at trial did in her first habeas corpus proceeding challenge the underpresentation of women on the jury under Taylor v. Louisiana, 419 U.S. 522 (1975). Although she failed to obtain state relief, she did succeed in her first federal habeas corpus appeal. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1983). This Court held the Georgia "opt-out" provision for women led to unconstitutional underpresentation of women under Duren v. Missouri, 439 U.S. 357 (1979). Petitioner and his wife were tried within a few weeks of each other in the same county so that the Georgia provision applied to both juries.

The questions before this Court are (1) whether Smith's failure to comply with this state procedural rule constitutes a waiver of his right to challenge the jury composition, and (2) if there was such a waiver, whether Smith is entitled under any theory to be relieved of its preclusive effect.

We hold that Smith has not established "cause and prejudice" for his failure to raise the allegation of illegal jury composition until his second, successive state habeas corpus petition. We affirm the district court's holding that it was prohibited from considering this claim on its merits.

The law is clear that even if a jury is unconstitutional, that alone will not invalidate a conviction and death sentence if the defendant failed to make the proper constitutional challenge. Davis v. United States, 411 U.S. 233 (1973); Huffman v. Wainwright, 651 F.2d 347, 349 (5th Cir. Unit B 1981); Evans v. Maggio, 557 F.2d 430, 432-33 (5th Cir. 1977); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974). A failure to comply with state procedural requirements can be a waiver of the right to assert a constitutional violation. Wainwright v. Sykes, 433 U.S. 72 (1977). A state may restrict the time during which a defendant may raise a constitutional violation. Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). A federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. Francis v. Henderson, 425 U.S. 536, 541-42 (1976).

It is clear from the record, and the parties agree, that Smith made no objection to the jury composition because of underrepresentation of women at or before his trial, and therefore

waived his right to assert the matter under state law.[5/] The question is therefore whether Smith is entitled under any theory to be relieved of his waiver of the claim, and to assert the jury composition claim on this second petition for habeas corpus.

The Supreme Court has held that for a federal court to consider the merits of a defendant's claim, where the defendant has failed to comply with a state contemporaneous objection rule, the defendant must show "cause" for noncompliance with the rule and "actual prejudice." United States v. Frady, 456 U.S. 152 (1982); Wainwright v. Sykes, 433 U.S. 72, 89 (1977); Francis v. Henderson, 425 U.S. 536 (1976).

The requirement in Wainwright v. Sykes, 433 U.S. 72 (1977), that a defendant show "cause" for noncompliance with a state contemporaneous objection rule was designed to eliminate the possibility of "sandbagging" by defense lawyers, and to reduce the possibility that the federal court will decide a constitutional issue without the benefit of the state's views. Sykes, 433 U.S. at 89-90; Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), petition for cert. filed, No. 82-6923 (June 14, 1983). While the Supreme Court has not explicitly defined cause and prejudice, our precedents have stated that "cause" sufficient to excuse a procedural default is designed to avoid a "miscarriage of justice." Ford, 696 F.2d at 817; Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981).

Smith contends that he established "cause" for noncompliance with the state procedural rule because his lawyers were ignorant of recently decided cases. On January 21, 1975, six days before Smith's trial began, the Supreme Court decided Taylor v. Louisiana, 419 U.S. 522 (1975). Taylor held that the constitution requires that a jury be selected from a representative cross-section of the community and that the Louisiana statute which automatically excluded women from jury service unless they filed a written request to be subject to jury service, an "opt-in" statute that led to underrepresentation of women on the jury, was unconstitutional. In Duren v. Missouri, 439 U.S. 357 (1979), decided January 9, 1979, 43 days before Smith filed his first federal habeas corpus petition, the Court held unconstitutional an "opt-out" statute which granted automatic exemption from jury service to any woman requesting it. On June 25, 1982, this Court held unconstitutional Georgia Code Ann. § 59-124 (1965) (repealed 1975), the "opt-out" statute under which Smith's jury was selected in Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).

It was not until after Machetti was decided that Smith sought to litigate the jury composition issue in his second state habeas corpus petition, first in the Superior Court of Butts County and then in the Georgia Supreme Court. Smith v. Zant, 301 S.E.2d 32 (Ga. 1983). The state habeas corpus court applied the state procedural waiver rule and did not consider the issue of alleged

illegal jury composition on the merits. The Supreme Court of Georgia found that Smith had not shown grounds for raising this issue in his second habeas petition. The federal district court held that it was precluded from considering this claim because the state court applied the state procedural rule and did not consider the merits of the claim.

To show cause for his failure to object before the second state habeas corpus petition, Smith has presented affidavits that his trial lawyers were unaware of the Taylor decision at the time of his trial, and he argues that Duren and Machetti were intervening changes in the law which justify his failure to raise the issue until his second state habeas corpus petition.

Smith's argument fails for several reasons. First, counsel's lack of awareness of the Taylor decision at the time of trial does not establish "cause." In Engle v. Isaac, 456 U.S. 107, 134 (1981), the Supreme Court stated:

> Where the basis of a constitutional claim is available, and other defense counsel have preceived and litigated that claim, the demands of comity and finality counsel against labelling unawareness of the objection as cause for procedural default.

See also Dumont v. Estelle, 513 F.2d 793, 798 (5th Cir. 1975) (reliance on state law at the time of trial does not, by itself, constitute cause).

Second, Smith has not established "cause" because of any supervening "change in the law" resulting from Duren v. Missouri, 439 U.S. 357 (1979), or Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, 103 S.Ct. 763 (1983). In Lee v. Missouri, 439 U.S. 461 (1979), the Supreme Court held that the 1979 Duren decision would be retroactively applied to any jury sworn after the 1975 Taylor decision, because Duren did not announce any new standards of constitutional law not evident from Taylor. 439 U.S. at 462. In light of the Supreme Court's explicit statement that the principles of Duren were evident from Taylor, we cannot hold that Duren made such a fundamental change in the law that it established "cause" for a failure to raise the issue at Smith's trial in 1975. The Machetti decision, which declared the Georgia "opt-out" provision unconstitutional, merely applied the Supreme Court's Duren decision striking the Missouri "opt-out" statute.

Smith's jury composition claim thus emanates directly from Taylor v. Louisiana, 419 U.S. 522 (1975). Smith cannot contend that his first opportunity to raise this Taylor issue was in his second state petition for habeas corpus for he cited Taylor in 1977 during the Georgia Supreme Court's review of his first state petition for habeas corpus. Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977). Referring to the Taylor case, Smith claimed his jury did not represent a true cross-section of the community because jurors who would automatically vote against the

death penalty were excused. That Taylor issue was considered by the Georgia Supreme Court, and was litigated in Smith's appeal to this Court from the denial of his first petition for federal habeas corpus relief. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 691 F.2d 858 (5th Cir. Unit B 1982).

Cause and prejudice are sometimes interrelated. Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981). In this case, Smith cannot show "cause" for his procedural default such that a hearing on the merits is necessary to prevent a "miscarriage of justice," nor can he show that "actual prejudice" from the alleged constitutional defect in jury selection affected his conviction.

In Daniel v. Louisiana, 420 U.S. 31 (1975), a criminal defendant had been convicted by a jury chosen in accordance with the Louisiana procedures later held unconstitutional in Taylor. Before Taylor was decided, Daniel had raised a timely motion to quash the petit jury venire, alleging that the jury selection procedures were unconstitutional because they resulted in the systematic exclusion of women from the petit jury venire. His motion was denied by the state court and the Louisiana Supreme Court. The United States Supreme Court was thus faced with the question of whether to apply Taylor to a case involving a jury (1) chosen according to the procedures declared unconstitutional in Taylor, and (2) empaneled prior to the Taylor decision, where there was

no procedural default by the defendant. The Court held that the Taylor decision was "not to be applied, as a matter of federal law, to convictions obtained by juries emplaneled prior to the date of [Taylor]". Daniel, 420 U.S. at 32. The Court stated:

> In Taylor, as in Duncan, our decision did not rest on the premises that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U.S. 57 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.

420 U.S. at 31-32. See also DeStefano v. Woods, 392 U.S. 631 (1968) (Supreme Court decisions holding states could not deny jury trial in serious criminal cases and criminal contempt cases did not apply retroactively to trials before those decisions).

Because the unconstitutional jury composition in Daniel did not necessarily render the defendant's criminal trial unfair, we fail to see how Smith can establish "actual prejudice" which affected his conviction, or how application of the procedural

default rule to Smith's case could result in a "miscarriage of justice." This is especially true where Smith, unlike Daniel, involves a procedural default.

We thus hold that Smith has not shown that the federal court could consider the merits of this claim under the existing legal authorities. The stay of execution hereinbefore granted is vacated. The judgment of the district court is

AFFIRMED.

FOOTNOTES

1/ Although convicted at separate trials, the cases of both petitioner and his wife were consolidated on direct appeal, since, with minor exceptions, the enumerated errors were common to both cases. They were represented by separate attorneys.

The enumerations of error were: (1) the testimony of the accomplice, John Maree, was not corroborated in that there was no independent evidence which connected the defendants with the alleged crimes or the commission thereof, (2) the trial court erred in admitting numerous instances of hearsay testimony where no evidence of a conspiracy existed independent of the testimony of the alleged coconspirator and accomplice, John Maree, (3) the trial court erred in admitting testimony of John Maree as to hearsay statements allegedly made by Rebecca Machetti in violation of defendant's rights to the confrontation clause, and as to petitioner where it was neither shown that Rebecca Machetti would refuse to testify or was otherwise unavailable to testify to the truth of such statements, (4) the trial court erred in admitting the testimony of two officers concerning their interviews with defendants without informing them of their Miranda rights, (5) because there was no valid statute authorizing the death penalty for murder in Georgia, the trial court committed reversible error in imposing the death penalty, (6) reversible error was committed by the trial court in overruling the demurrer to the indictment, (7) the evidence was insufficient to support a finding by the jury of the statutory aggravating circumstance necessary in death penalty cases, (8) the trial court erred in excluding prospective jurors because of their conscientious reservations against imposing the penalty in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), (9) the Georgia death penalty statute does not conform to the requirements of Furman v. Georgia, 408 U.S. 238 (1972), and the death penalty violates the eighth amendment, (10) the death penalty was disproportionate to the sentence imposed in similar cases, and (11) it was reversible error to permit cross-examination of petitioner about a letter from him to his wife and to admit a portion of the letter into evidence for the limited purpose of impeaching his testimony.

The Georgia Supreme Court undertook a sentence review for excessiveness, proportionality, and the influence of passion, prejudice, or any other arbitrary factor, and whether the evidence supported the jury's findings of aggravating circumstances.

2/ The Supreme Court of Georgia dealt with three issues on appeal from denial of habeas corpus relief: (1) petitioner was deprived of an impartial jury representing a true cross-section of the community as required by Taylor v. Louisiana, 419 U.S. 522 (1975), because persons who would automatically vote against imposing the death penalty without regard to the evidence were excused from the jury. Witherspoon v. Illinois, 391 U.S. 510 (1968). Evidence presented to the habeas corpus court showed that a Witherspoon qualified jury is guilt-prone and hence more likely to convict at the guilt phase of a bifurcated trial. "Because this is a death penalty case," 239 S.E.2d at 510, the court assumed without deciding there was cause to allow the objections to the composition of the traverse jury and did not apply the waiver rule of Wainwright v. Sykes, 433 U.S. 72 (1977), (2) the trial judge erred in failing to inquire of two excused prospective jurors whether they were able to make their personal views on the death penalty subservient to their legal duty as jurors, and (3) a letter from petitioner to his wife should not have been allowed in evidence.

3/ Smith raised three main issues on appeal from denial of federal habeas corpus relief. The exclusion from the jury for cause of two veniremen who were unequivocally opposed to the death penalty violated his sixth and fourteenth amendment rights in three respects: (1) the jury was conviction-prone, and not impartial; the jury did not represent a fair cross-section of the community; and the cumulative effect of such death qualification of jurors infringes the sixth amendment right to a properly functioning jury, (2) petitioner's death sentence was imposed pursuant to an arbitrary and racially discriminatory pattern of capital sentencing in Georgia, and (3) Georgia's capital sentencing review procedures are constitutionally inadequate.

4/ Sparks recalled that, after petitioner's trial, but before Becky Machetti's trial, Maree had "balked" and expressed unwillingness to testify further, protesting that, as Sparks well knew, Maree had no "deal" with the prosecutor. Sparks had reported his client's reluctance to give further testimony to Hasty who persisted in his refusal to promise Maree anything. Ultimately, Maree testified in Becky Machetti's trial, on Sparks' advice, even in the absence of any promise or agreement.

5/ Smith's satisfaction with the jurors called, from which his trial jury would be selected, does not merely appear from lack of objection. It was affirmatively stated in a stipulation and in Smith's counsel's response to a direct inquiry at the commencement of the proceedings on January 27, 1975. Immediately after formal arraignment and plea, the following transpired:

By Mr. Hasty: [for the State]
There is a stipulation that counsel would like to make, on approval of the Court, that in this formal arraignment that we use all names of the jurors who have already been called in the courtroom, that were called and sworn, and we will swear all of those jurors and the jury for this trial will be selected from that group of jurors. All the jurors will be put on the defendant at this time, if that is satisfactory.

By Mr. Byrd: [for the Defendant]
That is perfectly all right.

* * *

By the Court:
The court approves that stipulation.

By Mr. Hasty:
The jurors whose names have been called here in the courtroom this morning and sworn are the jurors good and true to pass between the State and you on the issue of this indictment, charging you with the offenses of Murder, touching your life or death. If you have any challenge to this array of jurors, let it be known at this time in writing, and you shall be heard. Any challenge?

By Mr. Byrd:
We don't have a challenge to the array as such, Your Honor, but, of course, we are reserving our right to the individual challenge.

By the Court:
All right sir.

No. 83-8611, JOHN ELDON SMITH v. RALPH M. KEMP

HATCHETT, J, Concurring in part and Dissenting in part:

I respectfully dissent on the Giglio issue. The prosecutor, Fred Hasty, in his closing argument in John Eldon Smith's 1975 trial, stated:

> I want to tell you one other thing .... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder, and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise. [Emphasis added.]

In Giglio v. United States, 405 U.S. 150, 153-154 (1972), a unanimous Supreme Court stated:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942). In Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct.

1173 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., 269, 3 L.Ed.2d at 1221. Thereafter Brady v. Maryland, 373 U.S., at 87, 10 L.Ed.2d at 218, 83 S.Ct. 1194 (1963), held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 3 L.Ed.2d at 1221. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict ....' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 10 L.Ed.2d at 218. A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ....' Napue, supra, at 271, 3 L.Ed.2d at 1222.

If a prosecutor fails to disclose to the jury an understanding or promise made to a witness, a Giglio violation occurs. Since an understanding existed between the prosecutor, Hasty, and the witness, Maree, undisclosed to the jury, I would remand to the district court for an evidentiary hearing on the issue. In order to appreciate the extent of the possible violation, it is vital to understand the facts as disclosed on the face of the record.

John Maree, a co-participant in the crime, was the key to successful prosecution of the two murders involved in this case. The state's case against Maree was strong. The state's evidence against Maree included his confession, his hand prints from the

victim's automobile, and a witness placing him at the crime scene. The case against Smith was weak. Without Maree's testimony, Smith could not be placed at the crime scene.

Seven years after Smith's trial, Hasty, the prosecutor who tried the case, told Millard Farmer, a lawyer and old acquaintance, that he (Hasty) had made a deal with Maree. Hasty explained that the deal was: a recommendation for a life sentence in exchange for Maree's testimony against the Smiths. Farmer conveyed Hasty's remarks to Smith's counsel in New York. On May 25, 1983, Farmer presented an affidavit to Hasty reciting the subject matter of that prior conversation. After the two men had lunch together, Hasty found an error in the affidavit and had his secretary retype it correcting the error. At the time Hasty signed the affidavit, Farmer informed him that the affidavit would be used in Smith's post-conviction relief efforts. Hasty's affidavit in one portion stated:

> 3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences [sic] of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John Smith and Rebecca Machetti in exchange for sentences [sic] of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders. (Emphasis supplied.)

A month after Hasty executed the affidavit, one of Smith's lawyers telephoned Hasty to inform him that the affidavit would be used in a habeas corpus petition raising a Giglio claim. Hasty did not object and did not claim that the affidavit was incorrect.

In the June 13, 1983, state evidentiary hearing, Hasty testified concerning the case:

> I do know that at one point Mr. Boger [Smith's attorney] mentioned a Giglio motion that he expected to file. I do not recall any statements made about John Eldon Smith's conflict in testimony that he had given. I know that the Giglio motion was mentioned [but] that, at that time did not mean anything to me.

On January 12, 1983, Hasty learned for the first time that the disciplinary board of the Georgia State Bar Association had filed charges against him. Enclosed with the notice of disciplinary action were two items: 1) the transcript of Hasty's closing argument during Smith's 1975 trial in which Hasty told the jury that no promises were made to Maree in exchange for his testimony, and 2) an excerpt from a 1978 deposition in which Hasty stated that he made a pre-trial agreement with Maree to testify against Smith and his codefendant, Rebecca Machetti. The pertinent portion of the 1978 deposition stated:

> A. Well, I talked to Mr. Morae [sic] of course, prior to [petitioner Smith's] trial, and he testified in that case and then he testified in Rebecca Machetti's trial ...
>
> Q. Did he believe that he was going to get off free or get out with a light sentence by testifying?

A. We had a discussion about this, and I had agreed that if he did testify that I, I would not insist on a trial and would allow him to enter a plea of guilty and receive life sentences.

Thus, Hasty, a seasoned prosecutor, had sworn under oath on two occasions, four years apart, that he made a deal in exchange for Maree's testimony. Because he told the Smith jury no deal had been made, he was in trouble with the Georgia State Bar.

On May 10, 1983, faced with suspension or disbarment, Hasty repudiated his two prior sworn statements at Smith's state habeas corpus evidentiary hearing. Hasty stated that he promised Maree nothing in exchange for his testimony, neither a lighter sentence nor a letter to the parole board. During the same hearing, however, Hasty's testimony reveals that an understanding did exist regarding what sentence he would recommend for Maree. In response to the question of whether he had ever made any promises to Maree's attorney, Sparks, regarding Maree, Hasty testified:

I recall-I had returned early on in the investigation when I saw what evidence we had, I knew if Mr. Morray [sic] testified, I knew what my recommendation would be. I had determined that and I think I ever discussed that with Mr. Thompson. At one time I thought I had discussed it with Mr. Wilkes, but Mr. Wilkes says I did not. So, I knew what I was going to do. But, because of, again, the policy I had, I did not discuss it with Mr. Sparks. And after the Rebecca Machetti or Rebecca Smith trial was over, I recall-and this would have probably been sometime in March of 1975--I recall Mr. Sparks came to my office and wanted to talk about the case. And earlier in my mind, I had known that if he testified that I was going to make a recommendation of concurrent life sentences. I recall when Mr. Sparks came into my office that we started discussing it and at that time I told him that I would recommend two consecutive life sentences and this upset Mr. Sparks. And he said, "Well, it ought to be concurrent." And I agreed almost immediately with him, that they would be concurrent life--recommendation for concurrent life sentences.

Hasty's explanation for his two prior sworn statements given four years apart: his "mind had become somewhat confused about what had actually happened."

Although no other clear promise is evident in the state court records, the record does show an understanding by all parties as to what would happen in the event Maree did not testify. The central portion of the understanding is illustrated by Maree's testimony. In a sworn affidavit he stated:

> The only statement made pertaining to my trial was that if I did not agree to testify, that then D.A. (Fred Hasty) would assign my case to an assistant district attorney for prosecution and that a death sentence would most likely be sought.

Maree's lawyer, Willie Sparks, characterized the understanding as follows:

> Mr. Hasty did say as I recall, that if Morray [sic] did not cooperate, it was quite possible that he would be the first man tried, and the state might well seek the death penalty.
>
> ****
>
> Well, after this conversation, while I can't recall precisely what was said, I conveyed to Mr. Morray [sic] that he did not have a deal with the state, but that I thought his best and wisest course purely from the point of view of his self interest was to testify for the state. His alternative was to go to trial on a case where he had already confessed a voluminous confession, where his palm print was found on the car and there was some chance the state would get the death penalty even though he did not appear to be the trigger man.

Hasty's statement of the understanding was:

> Q. Willie Sparks testified that you told him that if John Morray [sic] did not give testimony that he would be tried first and you would have now testified that that's in fact what happened.
>
> A. [Hasty] I do not remember telling Mr. Sparks that, but I know the prosecution business well enough to know that that's what I would have done.
>
> Q. But, it is your intention that if Mr. Morray [sic] did testify to the state, you would leave open the question of whether he in fact would be tried or would be permitted to plead guilty?
>
> A. [Hasty] Did not tell Mr. Sparks what I intended to do.

Due to the inconsistency between Hasty's testimony and his deposition and affidavit, the state court finding of no pretrial agreement is not fairly supported by the record. The incredible finding that Hasty and Maree had no understanding is supported only by Hasty's statement that he was confused. Logic, experience, and events at trial dictate otherwise.

A federal court must make its own credibility findings under these factual circumstances. State court credibility findings are never binding on a federal court. 28 U.S.C.A. § 2254(d)(8); Sumner v. Mata, 449 U.S. 539 (1981). The state record as a whole clearly shows that Hasty communicated to Maree the idea that he would be tried first and the death penalty sought unless he testified against Smith. This understanding, however, was not disclosed to Smith's trial jury. Instead, Hasty

intentionally misled the jury as to Maree's credibility. This is a Giglio violation. Under Giglio there is "no difference between concealment of a promise of leniency and concealment of a threat to prosecute." United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976). No explicit promise or deal need be shown. The due process violation occurs if there is an undisclosed inducement for the witness's testimony. Hawkins v. United States, 324 F.2d 873 (5th Cir. 1973). As the Ninth Circuit so aptly stated:

> [W]e know from experience that the Government, ...[has] ways of indicating to defendant's counsel that benefits are likely to result from cooperation. That can be indicated without making a bald promise that the charge is going to be reduced or that the case is going to be dismissed.

United States v. Butler, 567 F.2d 885, 888, n.4 (9th Cir. 1978).

The majority and the trial judge dismiss this issue with the comment that any juror would know that Maree sought to save his life by testifying. They miss the point. The point is that the jury did not know that an understanding had been reached and the witness was testifying with the assurance that his life had been saved. Giglio merely holds that the understanding must be disclosed. An affirmative duty is on the prosecutor to disclose the understanding rather than have the jurors attempt to figure it out. The jurors must know the facts so they may judge the testimony given in light of the interest the witness is or is not

seeking to protect. As Justice Frankfurter said in Griffin v. United States, 336 U.S. 704, 709 (1949): "it would ..., be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

Because the state findings are unsupported by the record as a whole, I would remand this case to the district court for an evidentiary hearing

This case again illustrates the difficulty, if not the impossibility, of imposing the death penalty in a fair and impartial manner. It is a classic example of how arbitrarily this penalty is imposed. Maree, who bargained to receive $1,000 for the murder and on whom the evidence was the strongest, is eligible for parole in November 1983. He will live because the evidence against him was overwhelming and the prosecutor needed his testimony to convict Smith and Machetti. Thus, a deal was struck.

Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Her lawyers timely raised this constitutional objection. They won; she lives.

John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation of women issue, even under principles of "manifest injustice." The fairness promised in Furman v. Georgia, 408 U.S. 238 (1972), has long been forgotten.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8611

JOHN ELDON SMITH,

Petitioner-Appellant,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent-Appellee.

MOTION FOR A STAY OF EXECUTION

Petitioner-appellant John Eldon Smith ("petitioner"), by his undersigned counsel, moves this Court, pursuant to 28 U.S.C. §2254, Rule 27 of the Federal Rules of Appellate Procedure, and Rule 17 of the Rules of this Court, for a stay of his execution, presently scheduled for September 21, 1983 pending the Court's action on his suggestion for rehearing en banc, filed herewith, and if rehearing is granted, pending final determination of petitioner's appeal. A copy of the order of the Superior Court of Bibb County, Georgia, entered September 9, 1983, setting petitioner's execution for September 21, 1983, is annexed as Appendix A. A copy of the opinion of this Court, entered September 9, 1983, is annexed as Appendix B.

The constitutional claims justifying a stay of execution

are set forth in the suggestion for rehearing en banc which accompanies this motion. If petitioner were executed before the suggestion could be carefully evaluated, or if he were executed after rehearing were granted but before the Court had taken final action, his injury would plainly be irreparable. See, e.g., Dobbert v. Wainwright, 670 F.2d 938, 940 (11th Cir. 1982). No corresponding irreparable injury would be worked on respondent Kemp by issuance of a stay, since he is empowered to retain custody of petitioner pending final determination of the Court. The public interest is mixed: while the public may have some cognizable interest in seeing that valid and constitutional judgments of state courts are carried out, there is no public interest -- to the contrary, there exists potential for public harm -- if petitioner were put to death despite a constitutional flaw in his conviction or sentence that might come to light upon full review, and that might ultimately warrant reversal by this Court.

WHEREFORE, for all of the reasons set forth above, petitioner urges the Court to grant his motion for a stay of execution pending the Court's action on his suggestion for rehearing en banc and, if rehearing is granted, pending final determination of petitioner's appeal.

Dated: September 13, 1983

Respectfully submitted,

ROBERT C. GLUSTROM
116 East Howard Avenue
Decatur, Georgia 30030

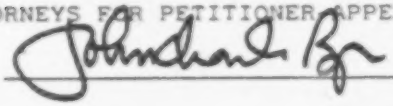
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ATTORNEYS FOR PETITIONER-APPELLANT

BY: 

IN THE SUPERIOR COURT OF BIBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	•	
	•	
V.	•	INDICTMENT NO. 16107
	•	MURDER (2 Counts)
JOHN ELDON SMITH, a/k/a ANTHONY ISALLDO MACHETTI, a/k/a TONY MACHETTI.	•	

ORDER

The Court having sentenced the defendant, John Eldon Smith on the 30th day of January, 1975, to be executed by the Department of Offender Rehabilitation at such penal institution as may be designated by said Department, in accordance with the laws of Georgia, and;

The date for the execution of the said John Eldon Smith having passed by reason of a supersedeas incident to appellate and collateral review;

IT IS CONSIDERED, ORDERED AND ADJUDGED by this Court that on the 21st day of September, 1983, the defendant, John Eldor Smith, shall be executed by the Department of Offender Rehabilitation at such penal institution as may be designated by said Department all in accordance with the laws of Georgia.

The Clerk is directed to serve a copy of this Order upon the Commissioner of the Department of Offender Rehabilitation, the Warden of the Georgia Diagnostic and Classification Center, Jacksc Georgia, the Attorney General for the State of Georgia, the District Attorney, the Defendant, and last known counsel of record for the Defendant.

This 9th day of September, 1983.

9th FILED IN OFFICE
day of Sept 1983
Alice T. Byrd
Deputy Clerk

C. Cloud Morgan
Judge, Superior Court
Macon Judicial Circuit

I hereby certify that this document is a true and correct copy of the original on file in this office.
9-9-83
Alice T. Byrd
Deputy Clerk

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-8611

PUBLISH

JOHN ELDON SMITH,

Petitioner-Appellant,

versus

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(September 9, 1983)

APPENDIX B

Before RONEY, HILL and HATCHETT, Circuit Judges.

RONEY and HILL, Circuit Judges:

Joseph Ronald Akins and his wife of twenty days, Juanita Knight Akins, were killed in a secluded area of a new housing development in Bibb County, Georgia, on August 31, 1974, by shotgun blasts fired at close range. Petitioner, John Eldon Smith, also known as Tony Machetti, charged with firing the shotgun, was convicted of murder and sentenced to death.

Briefly, the evidence was that petitioner and his wife, Rebecca Akins Smith Machetti, together with John Maree, plotted to kill Akins, a former husband of Rebecca's and the father of her three children, in order to collect his life insurance proceeds. John Maree testified that he and petitioner lured Akins to the area of the crime on the pretense of installing a television antenna. When Akins appeared with his wife, petitioner shot them both.

Before this Court is the appeal from a denial of a second federal habeas corpus petition that asserted three grounds for relief: first, John Maree had a pretrial agreement or understanding not revealed to the jury so that the trial was unconstitutional under Giglio v. United States, 405 U.S. 150 (1972); second, the Georgia death statute is applied in an

unconstitutional, arbitrary, and discriminatory way; and third, the underrepresentation of women made the jury that convicted him unconstitutional under Taylor v. Louisiana, 419 U.S. 522 (1975).

We affirm the denial of habeas corpus relief holding first, the Giglio claim, although not asserted in the prior federal habeas corpus proceeding, was resolved by a state court's findings of fact that there was no understanding or agreement that should have been revealed to the jury; second, that defendant had a full opportunity to litigate and did litigate in his prior habeas corpus proceeding the issue concerning the arbitrary and discriminatory application of Georgia's death penalty to petitioner, so that the attempt to relitigate here is a clear abuse of the writ; and third, the defendant waived his right to object to the jury by failing to assert the issue at trial, on appeal, or on his first habeas corpus proceeding.

Petitioner's execution was scheduled for August 25, 1983. A notice of appeal was filed in this Court on Monday, August 22, from a denial of the relief by the district court entered on Friday, August 19. A motion for stay of execution was simultaneously filed, along with a motion for certificate of probable cause, denied by the district court.

Following the procedures indicated by Barefoot v. Estelle, _____ U.S. _____, 103 S.Ct. 3383 (1983), this Court gave proper notice that the Court would consider the merits as well as the

pending motion and heard two and one-half hours of oral argument on Tuesday, August 23. The parties cooperated by filing excellent briefs and thoroughly arguing all issues raised in this appeal. The Court entered a stay, in order to more thoroughly examine the issues presented, and called for additional briefs to be filed by August 29. Supreme Court Justice Powell refused to vacate the stay. Our decision here reflects the full consideration of the merits of the case based on the record from the trial and both habeas corpus proceedings, voluminous briefing at the trial and appellate stage, extensive oral argument, and the Court's independent research on the legal issues involved.

To understand our decision, insofar as it relates to the abuse of the writ and the waiver issues, it is helpful to review a chronology of the prior proceedings in this case:

Jan. 30, 1975	Petitioner convicted.
Feb. 1975	Rebecca Smith Machetti convicted.
Jan. 6, 1976	Conviction & sentences aff'd - Smith v. State, 236 Ga. 12, 222 S.Ed.2d 308 (1976).1/
July 6, 1976	Cert. denied, Smith v. Georgia, 428 U.S. 910 (1976).
Oct. 4, 1976	Petition for rehearing denied, Smith v. Georgia, 429 U.S. 874 (1976).
Oct. 22, 1976	Petition for Writ of Habeas Corpus - Georgia Superior Court
Mar. 16, 1977	Petition dismissed (unpublished order)
Oct. 18, 1977	Affirmed order dismissing, Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977).2/

June 5, 1978	Cert. denied, Smith v. Hopper, 436 U.S. 950 (1978).
Oct. 2, 1978	Petition for rehearing denied, Smith v. Hopper, 439 U.S. 884 (1978).
Feb. 21, 1979	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Sept. 9, 1980	U.S. Magistrate recommended denial of all relief.
Nov. 26, 1980	District court denied relief (unreported order and judgment).
Nov. 2, 1981	This Court affirmed, Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981).2/
Mar. 29, 1982	Opinion Modified on Rehearing, 671 F.2d 858 (5th Cir. Unit B 1982).
Oct. 5, 1982	Cert. denied, Smith v. Balkcom, 103 S.Ct. 181 (1982).
June 25, 1982	Second Petition for Writ of Habeas Corpus filed in Georgia Superior Court.
	Georgia Superior Court dismissed immediately without consideration of the merits.
Sept.16, 1982	Georgia Supreme Court remanded appeal "for an evidentiary hearing on the issues raised in the Petition."
Nov. 15, 1982	Superior Court on remand (after brief hearing on waiver issues) denied evidentiary hearing on merits and dismissed.
Mar. 1, 1983	Georgia Supreme Court reversed and remanded case again for evidentiary hearing on prosecutorial claim of misconduct. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983).
May 10, 1983 June 10, 1983	Evidentiary hearings before Superior Court.
Aug. 5, 1983	Superior Court's order denying relief.

Aug. 16, 1983	Georgia Supreme Court denied application for CPC.
Aug. 17, 1983	Petition for Writ of Habeas Corpus filed in U.S. District Court, M.D. Ga.
Aug. 17, 1983	Oral Argument before District Court.
Aug. 18, 1983	Petitioner's motion for an evidentiary hearing.
Aug. 19, 1983	Order denying motion. Order dismissing petition, denying CPC, denying IFP and denying stay of execution pending appeal.
Aug. 19, 1983	Notice of Appeal (USCA, 11th Cir.).
Aug. 22, 1983	Application for CPC, IFP and certificate of good faith and application for stay of execution.
Aug. 23, 1983	Oral Argument and Order granting CPC, IFP, and stay of execution.
Aug. 24, 1983	Motion to Vacate Stay applied to Justice Powell.
Aug. 24, 1983	Justice Powell's Order declining to vacate stay.
Aug. 25, 1983	Court's letter to counsel to file other material by August 29.

In these appeals and petitions, a total of 28 jurists on seven separate state and federal courts, some on several occasions (the Supreme Court of the United States has been petitioned four times, the Georgia Supreme Court five), have considered Smith's claims. He has sought procedural devices (stays of execution and full hearings) to insure that his claims be fully developed and

considered as well as relief on their merits. He has been provided most of the procedural protections sought. No court has found merit in any of his claims.

I. Alleged Giglio Violation.

The petitioner did not raise the claimed Giglio violation until his second state habeas corpus petition. At the insistence of the Supreme Court of Georgia on its second remand of that petition to the state habeas corpus judge, a hearing was held on petitioner's claim that the prosecution failed to correct the false testimony of John Maree, an accomplice and eyewitness who testified against Smith at the latter's trial, that Maree had no plea agreement with the state. Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983). Prosecutorial suppression of an agreement with or promise to a material witness in exchange for that witness' testimony violates a criminal defendant's due process rights. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony.

Maree testified on cross examination that he had never received any promises in exchange for his testimony other than "protection for my family and myself." Smith alleges that Maree had received a promise of a life sentence in exchange for testimony against petitioner and that the prosecutor concealed this promise from the jury.

On remand, the issue before the state habeas court centered upon the existence, vel non, of such a promise to, or

agreement with, witness Maree. After what we find to have been a full and fair hearing, the state judge found, as a fact, that there had been no such promise or agreement.

The hearing was extensive. While the issue was first joined upon exhibits of sworn statements of Fred Hasty, the District Attorney who had prosecuted petitioner and a contradictory affidavit of witness Maree, it was not confined to that. Hasty was called and testified, in person, before the court. Indeed, every person in life who was suggested as having knowledge of the alleged deal appeared, in person, and gave testimony on direct and cross examination.

Hasty denied that he had extended any promise to, or made any agreement with, witness Maree. He acknowledged that he had given prior contradictory sworn statements. In explaining the contradiction between his live testimony at the state habeas hearing and both the sworn statement in a deposition he gave in Becky Machetti's case and an affidavit he gave to Millard Farmer on behalf of appellant's counsel, Hasty testified that he thought the latter statements were true when he gave those statements, but after reviewing his file and the transcript of appellant's trial, Hast, realized that these statements were not true. Transcript of May 10, 1983 hearing at 88-89, 93. Hasty explained that when he gave those statements, he had not reviewed his file or the transcript. Transcript of May 10, 1983 hearing at 100-101. Hasty testified that at the time of Smith's trial, he knew what he was going to do with reference to the case pending against

John Maree, if Maree testified, but did not discuss this with Mr. Sparks. Transcript of May 10, 1983 hearing at 77.

The sworn testimony of every live witness who testified at the state habeas hearing contradicts Hasty's two affidavits. Willis Sparks, who represented Maree on the murder charge in 1974, testified that he had asked then District Attorney Hasty "point-blank" what Maree would receive from the prosecution in return for his testimony. Sparks swore that Hasty had steadfastly replied that the prosecutor would make no agreement with a co-defendant before trial because that was not his practice. Sparks further testified that Assistant District Attorney Thompson had never made any promise to Maree and that no one from either the Bibb County district attorney's office or sheriff's department had ever made any promises to Sparks as Maree's attorney. Sparks testified that he had recommended to Maree that the latter testify because Maree had already made a valid confession. Sparks had also noted that the confession had been corroborated by Maree's palm print found in the victim's car and that the state could and might well seek the death penalty against Maree.4/

Bibb County Sheriff Ray Wilkes stated that he was Chief Deputy of Bibb County when petitioner was tried and that no member of the sheriff's office made any promises to Maree.

Although the state habeas judge had before him the affidavit of Maree, then serving a life sentence, petitioner urged that Maree should appear and testify under cross examination. The state offered to produce Maree and the hearing was adjourned

to a date for his appearance. On June 13, 1983, one month after the initial hearing, he was produced, sworn, and testified. His testimoney was unequivocal. Maree testified that "at the first trial, there was no question about testifying. I didn't have any real conversation regarding any kind of a deal whatsoever." Transcript of June 13, 1983 hearing at 10. Maree unequivocally stated that he had had no discussions with Hasty concerning a life sentence in exchange for his testimony at Smith's murder trial. Id. Maree also stated at the state habeas hearing that he had testified at Smith's trial on advice of his counsel Sparks who had concluded that it was in Maree's best interest, under all the circumstances, to give full truthful testimony.

If the state habeas court afforded petitioner a full and fair hearing, we, as a federal habeas court, must apply a presumption of correctness to the state court's written factual findings. Sumner v. Mata, 449 U.S. 539 (1981); 28 U.S.C. §2254 (d). Petitioner must rebut this presumption by establishing by convincing evidence that the state court's findings are erroneous. Sumner v. Mata, 449 U.S. at 546; Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983).

The state court's findings of fact are amply supported by the evidence. Although Hasty's testimony was subject to the impeachment inherent in his prior sworn statements (which as sworn affidavits, constituted evidence of the facts stated in them), the state habeas judge found that there had been no promises made to, or agreement made with, witness Maree. In so finding,

the judge found in accordance with all the sworn testimony taken from all the witnesses who appeared before him. To have found to the contrary would have required a finding that each and every witness who knew the facts had lied in their testimony given at the hearing.

Resolution of conflicts in evidence and credibility issues rests within the province of the state habeas court, provided petitioner has been afforded the opportunity to a full and fair hearing. 28 U.S.C. §2254 (d) does not give federal habeas courts "license to redetermine credibility of witnesses whose demeanor has been observed by the state . . . court, but not by them." Marshall v. Lonberger, 103 S.Ct. 843, 851 (1983). The state court's finding that there was no agreement between Maree and the prosecution is "fairly supported by the record." See 28 U.S.C. §2254 (d) (8). Petitioner has not satisfied his burden of proving by convincing evidence that this finding was erroneous.

Petitioner asserts that the state habeas hearing was not full and fair. He first asserts that the hearing was flawed because, at that hearing, Hasty was represented by private counsel and representatives of the State Bar of Georgia were present. Petitioner's assertions that Hasty had made a "deal" with witness Maree and had abided its concealment at petitioner's trial had attracted the bar's attention. Such conduct might well constitute unethical conduct. Petitioner does not contend that the presence

of the bar investigators or Hasty's counsel prevented petitioner from presenting any evidence or argument or otherwise fully developing his claim.

As we view the record, the impact, if any, of the pendency of state bar proceedings against Hasty aided petitioner. The state habeas court was certainly aware of the presence of the bar investigators. The fact that Hasty was subject to such proceedings would tend to impeach his testimony at the hearing, to petitioner's benefit. The presence of his private counsel, retained in connection with the disciplinary matter, and the presence of the bar representatives presented motivation to Hasty to exonerate himself most dramatically. It would have been material to petitioner's attack upon Hasty's testimony to have proven the coincident disciplinary proceedings. They were shown to the state court more effectively than petitioner could have been expected to prove.

Attorney Millard Farmer, said to have been doing "leg work" for petitioner's attorneys, had taken the affidavit from Hasty offered in support of petitioner's claim. After concluding the second hearing, at which Hasty had denied the correctness of the affidavit and had sworn that he had been assured by Farmer that he would have an opportunity to correct it, the state judge allowed petitioner additional time to produce Farmer as a witness,

live or by deposition. Transcript of June 13, 1983 hearing at 144-45. Petitioner chose, instead, to file Farmer's affidavit.

Petitioner argues that the state habeas hearing was faulty in that he was not allowed to subpoena and inspect the confidential record of the Georgia State Pardon and Parole Board concerning witness Maree. Georgia law provides that these files remain confidential. O.C.G.A. § 42-9-53. It is suggested that such a record might contain some support for the contention that, before petitioner's trial, a promise had been made to Maree. At the district court's direction this file, sealed, was provided to the district judge who examined it in camera. It is a part of the record before us. We have examined it. It offers no support for that proposition.

Petitioner asserts that the state hearing was less than full and fair in that the state court refused to admit testimony from proffered witness Reverend Murphy Davis. This witness offered to state that long after petitioner's trial, Davis had participated in a debate with former Assistant Bibb County District Attorney Donald Thompson as to the propriety, vel non, of the death penalty and that at that debate, Thompson had stated that it was necessary for Maree to be let off with a life sentence in order to obtain evidence against petitioner and Rebecca Machetti. Petitioner offered Davis' testimony to prove the truth of Thompson's statement. Thompson pre-deceased these proceedings. Aside from the insufficiency of what Thompson is alleged to have said to

prove the existence of a pretrial deal with witness Maree, this evidence was offered to prove the truth of the matter therein and constituted inadmissible hearsay. The state judge permitted petitioner to proffer the testimony of Rev. Davis in the form of a direct examination of Davis.

We conclude that the state habeas court afforded petitioner a full and fair hearing on this contention. All witnesses desired by petitioner were produced even where adjournment was required for their production. No admissible evidence offered by petitioner was excluded. The finding that there was not a pretrial agreement or promise to Maree was supported by all the sworn testimony and it was substantial. Absent a deal or promise, there was no Giglio violation arising from the failure of the prosecution to reveal one.

Petitioner alternatively asserts that the prosecution presented a threat against witness Maree and that failure to reveal this threat to the jury violated Giglio v. United States, supra. In pretrial discussions with Maree and his counsel, Sparks, the prosecutor had outlined Maree's position. Maree had confessed to the murders. His confession gave the prosecutor a better case against Maree than the state possessed against Maree's co-indictees. The nature of the crime made the death penalty available.

Nothing stated to Maree was concealed from the jury. Maree's testimony at trial made it abundantly clear that he was subject to prosecution. The jury knew that. No one concealed from the jury that Maree hoped, by testifying, that he might

escape the death penalty. If that was not apparent from Maree's testimony, the prosecutor made it clear to the jury when he said, in closing argument

> I want to tell you one other thing.... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machatti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise.

The threatened position of Maree was clear to the jury. He was subject to prosecution on two counts of murder (He was so prosecuted); the district attorney intended to obtain convictions on both counts (He did); Maree was hoping to avoid the death penalty (He did); but no promise had been made to him.

The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on "the impact on the jury." United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir. 1978); see United States v. Meinster, 619 F.2d 1041, 1044-45

(4th Cir. 1980) (Intent of Giglio "is not to punish the prosecutor; rather the primary concern is that the jury not be misled by the prosecution's knowing use of perjured testimony."); United States v. Barham, 595 F.2d 231, 243 (5th Cir. 1979).

In this case Maree's fears and aspirations were clear. The jury was made aware of Maree's situation and could test his credibility taking his threatened posture into consideration. Under the facts of this case, no Giglio violation occurred.

II. Appellant's Contention that Georgia Death Penalty Statute Is Arbitrarily And Discriminatorily Imposed.

In this successive habeas corpus petition, petitioner asserts that the death penalty in Georgia is arbitrarily and discriminatorily imposed. Smith unsuccessfully raised this same claim in his first federal habeas corpus petition. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, _____ U.S., _____, 103 S.Ct. 181 (1982). Appellant admits that the issue raised in this petition is the same claim which was previously decided adversely to him but asserts that he now has additional evidence which he could not have presented the first time this court adjudicated this issue. Alternatively, petitioner contends that this court altered the standard by which we adjudicate claims of discriminatory application of the death penalty in Georgia.

Rule 9(b) of the Rules governing §2254 cases provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert these grounds in a prior petition constituted an abuse of the writ.

Appellant correctly notes that a denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7 (1963). Rule 9(b) codifies the seminal case of Sanders and preserves existing case law with respect to abuse of the writ. Advisory Committee Note, Rule 9, Rules Governing Section 2254 cases in the United States District Courts (28 U.S.C.A. Foll. §2254); Potts v. Zant, 638 F.2d 727, 739 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981).

> In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal habeas court will adjudicate at least once the claims of a petitioner.

Potts v. Zant, 638 F.2d at 738.

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court held that a federal court may give

> controlling weight . . . to denial of a prior application for federal habeas . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to

> the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15. In determining whether the "ends of justice" would be served by readdressing the merits of the same contention as raised in the prior petition, we must look at objective factors, such as whether this was a full and fair hearing with respect to the first petition and whether there has been an intervening change in the law. Id. at 16-17; Potts v. Zant, 638 F.2d at 739.

In the case at bar, Smith concedes that his argument regarding the alleged discriminatory application of Georgia's death penalty statute presents the same claim that was determined adversely to the applicant in the prior adjudication. No party disputes that the prior determination was on the merits. See Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, ____ U.S. ____, 103 S.Ct. 181 (1982). We must therefore determine whether a new adjudication of the merits of petitioner's argument would serve the ends of justice. We conclude that it would not.

Petitioner bears the burden of showing that the ends of justice would be served by a redetermination. Sanders v. United States, 373 U.S. at 17. Appellant has not alleged that the initial hearing on this issue was not full and fair. See id. at

16-17. Smith cannot assert that the denial of the earlier petition constituted plain error. See Bailey v. Oliver, 695 F.2d 1323, 1325-26 (11th Cir. 1983). Petitioner asserts, however, that the panel's modification of its original opinion constituted a change in the law justifying his failure to raise a crucial point by presenting evidence of discriminatory impact. See Sanders v. United States, 373 U.S. at 16-17. This assertion lacks merit.

The modification of our opinion in the earlier adjudication of petitioner's contention, Smith v. Balkcom, 671 F.2d at 859, did not alter the requirement that a petitioner prove intentional discrimination. Our earlier opinion, 660 F.2d 573, 585 (5th Cir. Unit B 1981), implied that the court would never find intentional or purposeful discrimination from circumstantial proof or proof of racially disproportionate impact. The modified opinion acknowledged that under long existing precedent, in certain instances, "statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose." Smith v. Balkcom, 671 F.2d at 859 (citing Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 266 (1977) and Furman v. Georgia, 408 U.S. 238, 239 n.12 (1972) (Burger, C.J., dissenting)). That is the proposition upon which Smith proceeded in his first habeas petition and our opinion worked no change in that proposition. Neither the original panel opinion nor the modification undertook to decide that

evidence would prove purposeful discrimination by a state; they merely pointed up some shortcomings in the evidence petitioner offered to support his claim. There was no remand. The issue having been fully and fairly presented by petitioner in this first habeas petition was finally decided.

Petitioner's attempt to present "new evidence" in his second petition merely seeks to introduce a modified and expanded version of statistics already rejected by this court in adjudicating the merits of the prior petition. In this successive habeas petition, Smith offers additional conclusions said to be drawn from the same records that were available to him when this identical assertion was made and adjudicated by the several courts which passed upon it. To entertain such piecemeal submissions would not serve the ends of justice but would allow prisoners to file nuisance and vexatious petitions. To allow Smith to reassert this claim would allow any unsuccessful habeas petitioner to file additional successive applications by keeping teams of aides at work studying the same data and proffering additional arguments and conclusions derived from and based upon the ongoing study. That is precisely what Rule 9(b) prohibits. Without a further showing of how the ends of justice would be served by considering Smith's reassertion of the same discrimination claim, Rule 9(b) precludes consideration of the merits of petitioner's argument in this successive petition.

III. Constitutionality of Jury.

Smith made no challenge to the jury because of the underrepresentation of women at or before trial. The Georgia procedural rule requires that a defendant's challenge to jury composition be made at or before the time the jury is "put upon him". O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. Smith also failed to raise the jury composition issue on direct appeal to the Georgia Supreme Court, in his initial state habeas corpus action, or in his initial federal habeas corpus petition. Smith's wife, however, while not raising the issue at trial did in her first habeas corpus proceeding challenge the underpresentation of women on the jury under Taylor v. Louisiana, 419 U.S. 522 (1975). Although she failed to obtain state relief, she did succeed in her first federal habeas corpus appeal. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1983). This Court held the Georgia "opt-out" provision for women led to unconstitutional underpresentation of women under Duren v. Missouri, 439 U.S. 357 (1979). Petitioner and his wife were tried within a few weeks of each other in the same county so that the Georgia provision applied to both juries.

The questions before this Court are (1) whether Smith's failure to comply with this state procedural rule constitutes a waiver of his right to challenge the jury composition, and (2) if there was such a waiver, whether Smith is entitled under any theory to be relieved of its preclusive effect.

We hold that Smith has not established "cause and prejudice" for his failure to raise the allegation of illegal jury composition until his second, successive state habeas corpus petition. We affirm the district court's holding that it was prohibited from considering this claim on its merits.

The law is clear that even if a jury is unconstitutional, that alone will not invalidate a conviction and death sentence if the defendant failed to make the proper constitutional challenge. Davis v. United States, 411 U.S. 233 (1973); Huffman v. Wainwright, 651 F.2d 347, 349 (5th Cir. Unit B 1981); Evans v. Maggio, 557 F.2d 430, 432-33 (5th Cir. 1977); Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974). A failure to comply with state procedural requirements can be a waiver of the right to assert a constitutional violation. Wainwright v. Sykes, 433 U.S. 72 (1977). A state may restrict the time during which a defendant may raise a constitutional violation. Parker v. North Carolina, 397 U.S. 790, 798-99 (1970). A federal court will honor a valid state procedural rule that a defendant's failure to object to a grand or petit jury before or during trial constitutes waiver of that objection as a basis for habeas corpus relief. Francis v. Henderson, 425 U.S. 536, 541-42 (1976).

It is clear from the record, and the parties agree, that Smith made no objection to the jury composition because of underrepresentation of women at or before his trial, and therefore

waived his right to assert the matter under state law.[3] The question is therefore whether Smith is entitled under any theory to be relieved of his waiver of the claim, and to assert the jury composition claim on this second petition for habeas corpus.

The Supreme Court has held that for a federal court to consider the merits of a defendant's claim, where the defendant has failed to comply with a state contemporaneous objection rule, the defendant must show "cause" for noncompliance with the rule and "actual prejudice." United States v. Frady, 456 U.S. 152 (1982); Wainwright v. Sykes, 433 U.S. 72, 89 (1977); Francis v. Henderson, 425 U.S. 536 (1976).

The requirement in Wainwright v. Sykes, 433 U.S. 72 (1977), that a defendant show "cause" for noncompliance with a state contemporaneous objection rule was designed to eliminate the possibility of "sandbagging" by defense lawyers, and to reduce the possibility that the federal court will decide a constitutional issue without the benefit of the state's views. Sykes, 433 U.S. at 89-90; Ford v. Strickland, 696 F.2d 804, 816 (11th Cir. 1983) (en banc), petition for cert. filed, No. 82-6923 (June 14, 1983). While the Supreme Court has not explicitly defined cause and prejudice, our precedents have stated that "cause" sufficient to excuse a procedural default is designed to avoid a "miscarriage of justice." Ford, 696 F.2d at 817; Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981).

Smith contends that he established "cause" for noncompliance with the state procedural rule because his lawyers were ignorant of recently decided cases. On January 21, 1975, six days before Smith's trial began, the Supreme Court decided Taylor v. Louisiana, 419 U.S. 522 (1975). Taylor held that the constitution requires that a jury be selected from a representative cross-section of the community and that the Louisiana statute which automatically excluded women from jury service unless they filed a written request to be subject to jury service, an "opt-in" statute that led to underrepresentation of women on the jury, was unconstitutional. In Duren v. Missouri, 439 U.S. 357 (1979), decided January 9, 1979, 43 days before Smith filed his first federal habeas corpus petition, the Court held unconstitutional an "opt-out" statute which granted automatic exemption from jury service to any woman requesting it. On June 25, 1982, this Court held unconstitutional Georgia Code Ann. § 59-124 (1965) (repealed 1975), the "opt-out" statute under which Smith's jury was selected in Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).

It was not until after Machetti was decided that Smith sought to litigate the jury composition issue in his second state habeas corpus petition, first in the Superior Court of Butts County and then in the Georgia Supreme Court. Smith v. Zant, 301 S.E.2d 32 (Ga. 1983). The state habeas corpus court applied the state procedural waiver rule and did not consider the issue of alleged

illegal jury composition on the merits. The Supreme Court of Georgia found that Smith had not shown grounds for raising this issue in his second habeas petition. The federal district court held that it was precluded from considering this claim because the state court applied the state procedural rule and did not consider the merits of the claim.

To show cause for his failure to object before the second state habeas corpus petition, Smith has presented affidavits that his trial lawyers were unaware of the Taylor decision at the time of his trial, and he argues that Duren and Machetti were intervening changes in the law which justify his failure to raise the issue until his second state habeas corpus petition.

Smith's argument fails for several reasons. First, counsel's lack of awareness of the Taylor decision at the time of trial does not establish "cause." In Engle v. Isaac, 456 U.S. 107, 134 (1981), the Supreme Court stated:

> Where the basis of a constitutional claim is available, and other defense counsel have preceived and litigated that claim, the demands of comity and finality counsel against labelling unawareness of the objection as cause for procedural default.

See also Dumont v. Estelle, 513 F.2d 793, 798 (5th Cir. 1975) (reliance on state law at the time of trial does not, by itself, constitute cause).

Second, Smith has not established "cause" because of any supervening "change in the law" resulting from Duren v. Missouri, 439 U.S. 357 (1979), or Machetti v. Linahan, 679 F.2d 226 (11th Cir. 1982), cert. denied, 103 S.Ct. 763 (1983). In Lee v. Missouri, 439 U.S. 461 (1979), the Supreme Court held that the 1979 Duren decision would be retroactively applied to any jury sworn after the 1975 Taylor decision, because Duren did not announce any new standards of constitutional law not evident from Taylor. 439 U.S. at 462. In light of the Supreme Court's explicit statement that the principles of Duren were evident from Taylor, we cannot hold that Duren made such a fundamental change in the law that it established "cause" for a failure to raise the issue at Smith's trial in 1975. The Machetti decision, which declared the Georgia "opt-out" provision unconstitutional, merely applied the Supreme Court's Duren decision striking the Missouri "opt-out" statute.

Smith's jury composition claim thus emanates directly from Taylor v. Louisiana, 419 U.S. 522 (1975). Smith cannot contend that his first opportunity to raise this Taylor issue was in his second state petition for habeas corpus for he cited Taylor in 1977 during the Georgia Supreme Court's review of his first state petition for habeas corpus. Smith v. Hopper, 241 Ga. 99, 239 S.E.2d 510 (1977). Referring to the Taylor case, Smith claimed his jury did not represent a true cross-section of the community because jurors who would automatically vote against the

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death penalty were excused. That Taylor issue was considered by the Georgia Supreme Court, and was litigated in Smith's appeal to this Court from the denial of his first petition for federal habeas corpus relief. Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 691 F.2d 858 (5th Cir. Unit B 1982).

Cause and prejudice are sometimes interrelated. Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. Unit B 1981). In this case, Smith cannot show "cause" for his procedural default such that a hearing on the merits is necessary to prevent a "miscarriage of justice," nor can he show that "actual prejudice" from the alleged constitutional defect in jury selection affected his conviction.

In Daniel v. Louisiana, 420 U.S. 31 (1975), a criminal defendant had been convicted by a jury chosen in accordance with the Louisiana procedures later held unconstitutional in Taylor. Before Taylor was decided, Daniel had raised a timely motion to quash the petit jury venire, alleging that the jury selection procedures were unconstitutional because they resulted in the systematic exclusion of women from the petit jury venire. His motion was denied by the state court and the Louisiana Supreme Court. The United States Supreme Court was thus faced with the question of whether to apply Taylor to a case involving a jury (1) chosen according to the procedures declared unconstitutional in Taylor, and (2) empaneled prior to the Taylor decision, where there was

no procedural default by the defendant. The Court held that the Taylor decision was "not to be applied, as a matter of federal law, to convictions obtained by juries emplaneled prior to the date of [Taylor]". Daniel, 420 U.S. at 32. The Court stated:

> In Taylor, as in Duncan, our decision did not rest on the premises that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U.S. 57 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor.

420 U.S. at 31-32. See also DeStefano v. Woods, 392 U.S. 631 (1968) (Supreme Court decisions holding states could not deny jury trial in serious criminal cases and criminal contempt cases did not apply retroactively to trials before those decisions).

Because the unconstitutional jury composition in Daniel did not necessarily render the defendant's criminal trial unfair, we fail to see how Smith can establish "actual prejudice" which affected his conviction, or how application of the procedural

default rule to Smith's case could result in a "miscarriage of justice." This is especially true where Smith, unlike Daniel, involves a procedural default.

We thus hold that Smith has not shown that the federal court could consider the merits of this claim under the existing legal authorities. The stay of execution hereinbefore granted is vacated. The judgment of the district court is

AFFIRMED.

FOOTNOTES

1/ Although convicted at separate trials, the cases of both petitioner and his wife were consolidated on direct appeal, since, with minor exceptions, the enumerated errors were common to both cases. They were represented by separate attorneys.

The enumerations of error were: (1) the testimony of the accomplice, John Maree, was not corroborated in that there was no independent evidence which connected the defendants with the alleged crimes or the commission thereof, (2) the trial court erred in admitting numerous instances of hearsay testimony where no evidence of a conspiracy existed independent of the testimony of the alleged coconspirator and accomplice, John Maree, (3) the trial court erred in admitting testimony of John Maree as to hearsay statements allegedly made by Rebecca Machetti in violation of defendant's rights to the confrontation clause, and as to petitioner where it was neither shown that Rebecca Machetti would refuse to testify or was otherwise unavailable to testify to the truth of such statements, (4) the trial court erred in admitting the testimony of two officers concerning their interviews with defendants without informing them of their Miranda rights, (5) because there was no valid statute authorizing the death penalty for murder in Georgia, the trial court committed reversible error in imposing the death penalty, (6) reversible error was committed by the trial court in overruling the demurrer to the indictment, (7) the evidence was insufficient to support a finding by the jury of the statutory aggravating circumstance necessary in death penalty cases, (8) the trial court erred in excluding prospective jurors because of their conscientious reservations against imposing the penalty in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968), (9) the Georgia death penalty statute does not conform to the requirements of Furman v. Georgia, 408 U.S. 238 (1972), and the death penalty violates the eighth amendment, (10) the death penalty was disproportionate to the sentence imposed in similar cases, and (11) it was reversible error to permit cross-examination of petitioner about a letter from him to his wife and to admit a portion of the letter into evidence for the limited purpose of impeaching his testimony.

The Georgia Supreme Court undertook a sentence review for excessiveness, proportionality, and the influence of passion, prejudice, or any other arbitrary factor, and whether the evidence supported the jury's findings of aggravating circumstances.

2/ The Supreme Court of Georgia dealt with three issues on appeal from denial of habeas corpus relief: (1) petitioner was deprived of an impartial jury representing a true cross-section of the community as required by Taylor v. Louisiana, 419 U.S. 522 (1975), because persons who would automatically vote against imposing the death penalty without regard to the evidence were excused from the jury. Witherspoon v. Illinois, 391 U.S. 510 (1968). Evidence presented to the habeas corpus court showed that a Witherspoon qualified jury is guilt-prone and hence more likely to convict at the guilt phase of a bifurcated trial. "Because this is a death penalty case," 239 S.E.2d at 510, the court assumed without deciding there was cause to allow the objections to the composition of the traverse jury and did not apply the waiver rule of Wainwright v. Sykes, 433 U.S. 72 (1977), (2) the trial judge erred in failing to inquire of two excused prospective jurors whether they were able to make their personal views on the death penalty subservient to their legal duty as jurors, and (3) a letter from petitioner to his wife should not have been allowed in evidence.

3/ Smith raised three main issues on appeal from denial of federal habeas corpus relief. The exclusion from the jury for cause of two veniremen who were unequivocally opposed to the death penalty violated his sixth and fourteenth amendment rights in three respects: (1) the jury was conviction-prone, and not impartial; the jury did not represent a fair cross-section of the community; and the cumulative effect of such death qualification of jurors infringes the sixth amendment right to a properly functioning jury, (2) petitioner's death sentence was imposed pursuant to an arbitrary and racially discriminatory pattern of capital sentencing in Georgia, and (3) Georgia's capital sentencing review procedures are constitutionally inadequate.

4/ Sparks recalled that, after petitioner's trial, but before Becky Machetti's trial, Maree had "balked" and expressed unwillingness to testify further, protesting that, as Sparks well knew, Maree had no "deal" with the prosecutor. Sparks had reported his client's reluctance to give further testimony to Hasty who persisted in his refusal to promise Maree anything. Ultimately, Maree testified in Becky Machetti's trial [illegible] advice, even in the absence of any promise or agreement.

5/ Smith's satisfaction with the jurors called, from which his trial jury would be selected, does not merely appear from lack of objection. It was affirmatively stated in a stipulation and in Smith's counsel's response to a direct inquiry at the commencement of the proceedings on January 27, 1975. Immediately after formal arraignment and plea, the following transpired:

By Mr. Hasty: [for the State]
There is a stipulation that counsel would like to make, on approval of the Court, that in this formal arraignment that we use all names of the jurors who have already been called in the courtroom, that were called and sworn, and we will swear all of those jurors and the jury for this trial will be selected from that group of jurors. All the jurors will be put on the defendant at this time, if that is satisfactory.

By Mr. Byrd: [for the Defendant]
That is perfectly all right.

* * *

By the Court:
The court approves that stipulation.

By Mr. Hasty:
The jurors whose names have been called here in the courtroom this morning and sworn are the jurors good and true to pass between the State and you on the issue of this indictment, charging you with the offenses of Murder, touching your life or death. If you have any challenge to this array of jurors, let it be known at this time in writing, and you shall be heard. Any challenge?

By Mr. Byrd:
We don't have a challenge to the array as such, Your Honor, but, of course, we are reserving our right to the individual challenge.

By the Court:
All right sir.

No. 83-8611, JOHN ELDON SMITH v. RALPH M. KEMP

HATCHETT, J, Concurring in part and Dissenting in part:

I respectfully dissent on the Giglio issue. The prosecutor, Fred Hasty, in his closing argument in John Eldon Smith's 1975 trial, stated:

> I want to tell you one other thing .... This indictment charges John Eldon Smith, a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of Murder in two counts, and this case has been severed and Tony Machetti is being tried. You are not to pass on the guilt of the other two defendants. As District Attorney of this Circuit, I tell you that those two other defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder, and you will hear, I am sure, the defense attorney has the closing argument and will talk to you about John Maree, what he is going to get out of this trial. I can tell you right now what he is going to get out of it. He is going to be convicted of Murder, two counts of Murder, if I have anything to do with it. You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise. [Emphasis added.]

In Giglio v. United States, 405 U.S. 150, 153-154 (1972), a unanimous Supreme Court stated:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 79 L.Ed. 791, 794, 55 S.Ct. 340, 98 ALR 406 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177 (1942). In Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct.

1173 (1959), we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., 269, 3 L.Ed.2d at 1221. Thereafter Brady v. Maryland, 373 U.S., at 87, 10 L.Ed.2d at 218, 83 S.Ct. 1194 (1963), held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 3 L.Ed.2d at 1221. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict ....' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 10 L.Ed.2d at 218. A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ....' Napue, supra, at 271, 3 L.Ed.2d at 1222.

If a prosecutor fails to disclose to the jury an understanding or promise made to a witness, a Giglio violation occurs. Since an understanding existed between the prosecutor, Hasty, and the witness, Maree, undisclosed to the jury, I would remand to the district court for an evidentiary hearing on the issue. In order to appreciate the extent of the possible violation, it is vital to understand the facts as disclosed on the face of the record.

John Maree, a co-participant in the crime, was the key to successful prosecution of the two murders involved in this case. The state's case against Maree was strong. The state's evidence against Maree included his confession, his hand prints from the

victim's automobile, and a witness placing him at the crime scene. The case against Smith was weak. Without Maree's testimony, Smith could not be placed at the crime scene.

Seven years after Smith's trial, Hasty, the prosecutor who tried the case, told Millard Farmer, a lawyer and old acquaintance, that he (Hasty) had made a deal with Maree. Hasty explained that the deal was: a recommendation for a life sentence in exchange for Maree's testimony against the Smiths. Farmer conveyed Hasty's remarks to Smith's counsel in New York. On May 25, 1982, Farmer presented an affidavit to Hasty reciting the subject matter of that prior conversation. After the two men had lunch together, Hasty found an error in the affidavit and had his secretary retype it correcting the error. At the time Hasty signed the affidavit, Farmer informed him that the affidavit would be used in Smith's post-conviction relief efforts. Hasty's affidavit in one portion stated:

> 3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences [sic] of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John Smith and Rebecca Machetti in exchange for sentences [sic] of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders. (Emphasis supplied.)

A month after Hasty executed the affidavit, one of Smith's lawyers telephoned Hasty to inform him that the affidavit would be used in a habeas corpus petition raising a Giglio claim. Hasty did not object and did not claim that the affidavit was incorrect.

In the June 13, 1983, state evidentiary hearing, Hasty testified concerning the case:

> I do know that at one point Mr. Boger [Smith's attorney] mentioned a Giglio motion that he expected to file. I do not recall any statements made about John Eldon Smith's conflict in testimony that he had given. I know that the Giglio motion was mentioned [but] that, at that time did not mean anything to me.

On January 12, 1983, Hasty learned for the first time that the disciplinary board of the Georgia State Bar Association had filed charges against him. Enclosed with the notice of disciplinary action were two items: 1) the transcript of Hasty's closing argument during Smith's 1975 trial in which Hasty told the jury that no promises were made to Maree in exchange for his testimony, and 2) an excerpt from a 1978 deposition in which Hasty stated that he made a pre-trial agreement with Maree to testify against Smith and his codefendant, Rebecca Machetti. The pertinent portion of the 1978 deposition stated:

> A. Well, I talked to Mr. Morae [sic] of course, prior to [petitioner Smith's] trial, and he testified in that case and then he testified in Rebecca Machetti's trial ...
>
> Q. Did he believe that he was going to get off free or get out with a light sentence by testifying?

A. We had a discussion about this, and I had agreed that if he did testify that I, I would not insist on a trial and would allow him to enter a plea of guilty and receive life sentences.

Thus, Hasty, a seasoned prosecutor, had sworn under oath on two occasions, four years apart, that he made a deal in exchange for Maree's testimony. Because he told the Smith jury no deal had been made, he was in trouble with the Georgia State Bar.

On May 10, 1983, faced with suspension or disbarment, Hasty repudiated his two prior sworn statements at Smith's state habeas corpus evidentiary hearing. Hasty stated that he promised Maree nothing in exchange for his testimony, neither a lighter sentence nor a letter to the parole board. During the same hearing, however, Hasty's testimony reveals that an understanding did exist regarding what sentence he would recommend for Maree. In response to the question of whether he had ever made any promises to Maree's attorney, Sparks, regarding Maree, Hasty testified:

I recall-I had returned early on in the investigation when I saw what evidence we had, I knew if Mr. Morray [sic] testified, I knew what my recommendation would be. I had determined that and I think I ever discussed that with Mr. Thompson. At one time I thought I had discussed it with Mr. Wilkes, but Mr. Wilkes says I did not. So, I knew what I was going to do. But, because of, again, the policy I had, I did not discuss it with Mr. Sparks. And after the Rebecca Machetti or Rebecca Smith trial was over, I recall-and this would have probably been sometime in March of 1975--I recall Mr. Sparks came to my office and wanted to talk about the case. And earlier in my mind, I had known that if he testified that I was going to make a recommendation of concurrent life sentences. I recall when Mr. Sparks came into my office that we started discussing it and at that time I told him that I would recommend two consecutive life sentences and this upset Mr. Sparks. And he said, "Well, it ought to be concurrent." And I agreed almost immediately with him, that they would be concurrent life--recommendation for concurrent life sentences.

Hasty's explanation for his two prior sworn statements given four years apart: his "mind had become somewhat confused about what had actually happened."

Although no other clear promise is evident in the state court records, the record does show an understanding by all parties as to what would happen in the event Maree did not testify. The central portion of the understanding is illustrated by Maree's testimony. In a sworn affidavit he stated:

> The only statement made pertaining to my trial was that if I did not agree to testify, that then D.A. (Fred Hasty) would assign my case to an assistant district attorney for prosecution and that a death sentence would most likely be sought.

Maree's lawyer, Willie Sparks, characterized the understanding as follows:

> Mr. Hasty did say, as I recall, that if Morray [sic] did not cooperate, it was quite possible that he would be the first man tried, and the state might well seek the death penalty.
>
> ***
>
> Well, after this conversation, while I can't recall precisely what was said, I conveyed to Mr. Morray [sic] that he did not have a deal with the state, but that I thought his best and wisest course purely from the point of view of his self interest was to testify for the state. His alternative was to go to trial on a case where he had already confessed a voluminous confession, where his palm print was found on the car and there was some chance the state would get the death penalty even though he did not appear to be the trigger man.

Hasty's statement of the understanding was:

> Q. Willie Sparks testified that you told him that if John Morray [sic] did not give testimony that he would be tried first and you would have now testified that that's in fact what happened.
>
> A. [Hasty] I do not remember telling Mr. Sparks that, but I know the prosecution business well enough to know that that's what I would have done.
>
> Q. But, it is your intention that if Mr. Morray [sic] did testify to the state, you would leave open the question of whether he in fact would be tried or would be permitted to plead guilty?
>
> A. [Hasty] Did not tell Mr. Sparks what I intended to do.

Due to the inconsistency between Hasty's testimony and his deposition and affidavit, the state court finding of no pretrial agreement is not fairly supported by the record. The incredible finding that Hasty and Maree had no understanding is supported only by Hasty's statement that he was confused. Logic, experience, and events at trial dictate otherwise.

A federal court must make its own credibility findings under these factual circumstances. State court credibility findings are never binding on a federal court. 28 U.S.C.A. § 2254(d)(8); Sumner v. Mata, 449 U.S. 539 (1981). The state record as a whole clearly shows that Hasty communicated to Maree the idea that he would be tried first and the death penalty sought unless he testified against Smith. This understanding, however, was not disclosed to Smith's trial jury. Instead, Hasty

intentionally misled the jury as to Maree's credibility. This is a Giglio violation. Under Giglio there is "no difference between concealment of a promise of leniency and concealment of a threat to prosecute." United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976). No explicit promise or deal need be shown. The due process violation occurs if there is an undisclosed inducement for the witness's testimony. Hawkins v. United States, 324 F.2d 873 (5th Cir. 1973). As the Ninth Circuit so aptly stated:

> [W]e know from experience that the Government, ...[has] ways of indicating to defendant's counsel that benefits are likely to result from cooperation. That can be indicated without making a bald promise that the charge is going to be reduced or that the case is going to be dismissed.

United States v. Butler, 567 F.2d 885, 888, n.4 (9th Cir. 1978).

The majority and the trial judge dismiss this issue with the comment that any juror would know that Maree sought to save his life by testifying. They miss the point. The point is that the jury did not know that an understanding had been reached and the witness was testifying with the assurance that his life had been saved. Giglio merely holds that the understanding must be disclosed. An affirmative duty is on the prosecutor to disclose the understanding rather than have the jurors attempt to figure it out. The jurors must know the facts so they may judge the testimony given in light of the interest the witness is or is not

seeking to protect. As Justice Frankfurter said in Griffin v. United States, 336 U.S. 704, 709 (1949): "it would ... be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

Because the state findings are unsupported by the record as a whole, I would remand this case to the district court for an evidentiary hearing

This case again illustrates the difficulty, if not the impossibility, of imposing the death penalty in a fair and impartial manner. It is a classic example of how arbitrarily this penalty is imposed. Maree, who bargained to receive $1,000 for the murder and on whom the evidence was the strongest, is eligible for parole in November 1983. He will live because the evidence against him was overwhelming and the prosecutor needed his testimony to convict Smith and Machetti. Thus, a deal was struck.

Machetti, the mastermind in this murder, has had her conviction overturned, has had a new trial, and has received a life sentence. This court overturned her first conviction because in the county where her trial was held, women were unconstitutionally underrepresented in the jury pool. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982). Her lawyers timely raised this constitutional objection. They won; she lives.

John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Judicial economy, as required by recent decisions of the United States Supreme Court, dictate that we not reach the underrepresentation of women issue, even under principles of "manifest injustice." The fairness promised in Furman v. Georgia, 408 U.S. 238 (1972), has long been forgotten.

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for petitioner-appellant, and that I have served the annexed motion for a stay of execution on counsel for respondent, by hand, at the following address:

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Done this 13th day of September, 1983.

JOHN CHARLES BOGER

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
RECEIVED
SEP 14 1983
ATLANTA, GEORGIA

No. 83-8611

JOHN ELDON SMITH,

Petitioner/Appellant,

v.

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent/Appellee.

RESPONSE TO PETITIONER'S MOTION
FOR A STAY OF EXECUTION

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- PETITIONER'S EXHIBIT NO. 24 -

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8611

JOHN ELDON SMITH,

Petitioner/Appellant,

v.

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent/Appellee.

RESPONSE TO PETITIONER'S MOTION
FOR A STAY OF EXECUTION

COMES NOW Ralph M. Kemp, Superintendent, Georgia Diagnostic and Classification Center, Respondent-Appellee in the above-styled appeal from the denial of federal habeas corpus relief by the district court and by this Court in a panel decision dated September 9, 1983, and makes this his response to Petitioner's motion for a stay of execution pending the disposition of Petitioner's suggestion for rehearing en banc, as authorized under Rule 17 of the Rules of this Court, by showing and stating the following:

1.

Respondent submits that clearly, a review of Petitioner's suggestion for rehearing en banc, viewed in light of the panel decision of this Court dated September 9, 1983, does not establish, as claimed by the Petitioner, that "a constitutional flaw in Petitioner's conviction or sentence may come to light upon full review." (Motion for stay of execution, p. 2). A concise and accurate characterization of the claims raised by Petitioner in his appeal to this Court from the denial of federal habeas corpus relief and reargued in his suggestion for rehearing en banc, was made by Justice Powell in his opinion denying the application of the Respondent to vacate the stay of execution granted to Petitioner by this Court. Justice Powell stated, "This case appears to be another example of 'last minute' presentation of issues previously considered or issues that may well have been raised at an earlier date." (Appendix "A"). Justice Powell further observed in reviewing the application of the Respondent to vacate the stay of execution order by this Court that, ". . . it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration." (Appendix "A").

The panel decision of this Court cited the appropriate federal legal authority available in this circuit and as decided by the Supreme Court of the United States in determining

that each of Petitioner's allegations were clearly without merit. As noted in the panel decision, Petitioner has ". . . sought procedural devices (stays of execution and full hearings) to insure that his claims be fully developed and considered as well as relief on their merits. He has been provided most of the procedural protections sought. No court has found merit in any of his claims." (Panel decision of September 9, 1983, p. 6-7).

This panel's decision clearly conformed with the decisions of this Court and the Supreme Court of the United States in Giglio v. United States, 405 U.S. 150 (1972); Sanders v. United States, 373 U.S. 1 (1963); Price v. Johnston, 334 U.S. 266 (1948); Potts v. Zant, 638 F.2d 727 (5th Cir., Unit B, 1981); and Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980), and Respondent submits that no suggestion for rehearing en banc is viable and therefore Petitioner's motion for a stay of execution is unnecessary.

The panel of this Court properly vacated the stay of execution hereinbefore granted by this Court, having given full consideration to the claims of the Petitioner raised by means of extensive briefs for both parties and extensive oral argument conducted by the panel.

Respondent submits that the suggestion for rehearing en banc is clearly without merit and therefore, no stay of execution

is required for this Court to consider these claims. Due to the fact that the record has been fully and completely developed and is before this Court, counsel for the Respondent submits that the suggestion for rehearing en banc can be adequately and completely considered prior to the date of Petitioner's execution presently scheduled for September 21st, 1983.

Respondent submits that the public interest is not "mixed" in this case, as alleged by counsel for Petitioner, as a review of the extensive procedural history of Petitioner's case since his conviction and sentence in the Superior Court of Bibb County in 1975, shows that it is in the public interest to see that there is some finality to the judgments of state courts. As the Supreme Court of the United States observed in Evans v. Bennett, 440 U.S. 1301, 1303 (1979), "there comes a time when even a sentence as final as the death penalty must be imposed."

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that a speedy resolution be given to Petitioner's suggestion for rehearing en banc and that Petitioner's motion for a stay of execution pending a decision on the suggestion for rehearing en banc should be denied for the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the above and foregoing Response to Petitioner's Motion for a Stay of Execution upon:

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by depositing a copy of same in the United States mail properly addressed with sufficient postage prepaid.

This 14th day of September, 1983.

Susan V. Boleyn

SUSAN V. BOLEYN
Assistant Attorney General

OPINION

Kemp v. Smith

No. A-133

JUSTICE POWELL, Circuit Justice

Respondent Smith, a convicted murderer, is scheduled to be executed by the state of Georgia at 8:00 a.m. tomorrow, Thursday August 25.

At about 5:25 p.m. on August 23, the Court of Appeals for the Eleventh Circuit - reversing the district court - granted a stay of execution. Its brief opinion stated that substantial issues were raised in this habeas corpus proceeding that justified review of their merits. Judge Hill dissented. At about 10:00 a.m. today, the Attorney General of Georgia filed an application with me as Circuit Justice requesting that I dissolve and vacate this stay. A response to this application was received this afternoon in my chambers at about 3:00 p.m.

This case appears to be another example of "last minute" presentation of issues previously considered or issues that may well have been raised at an earlier date. See Alabama v. Evans,

___U.S.___, 103 S. Ct. 1736 (1983). This is the fourth time that this capital case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and now in Smith's second federal habeas proceeding. Apart from rehearings, this case has been reviewed sixteen times by state and federal courts since Smith's conviction in 1975. In these circumstances, and for the reasons stated by Judge Hill in his dissenting opinion below, it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration.

But in the present posture of the case, the question before me as Circuit Justice is whether the Court of Appeals has abused its discretion in granting a temporary stay pending a hearing on the merits. I am not able so to conclude. It is apparent from the papers presented that the Court of Appeals heard arguments at some length on yesterday afternoon. Moreover, and quite properly, that court has provided for an expeditious hearing on the merits.

Accordingly, the application of the state of Georgia to vacate the stay ordered by the Court of Appeals is denied.

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
Certified this 3rd day of August, 1983
By Christine A. Vail
Deputy

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8611

JOHN ELDON SMITH,

Petitioner-Appellant,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent-Appellee.

On Appeal From The United States District Court
For The Middle District Of Georgia
Macon Division

PETITIONER-APPELLANT'S SUGGESTION FOR REHEARING EN BANC

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- PETITIONER'S EXHIBIT NO. 25 -

STATEMENT OF COUNSEL PURSUANT TO RULE 26(f)(2)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Eleventh Circuit, and that consideration by the full Court is necessary to secure the maintain uniformity of decisions in this Court:

Giglio v. United States, 405 U.S. 150 (1972)

Sanders v. United States, 373 U.S. 1 (1963)

Price v. Johnston, 334 U.S. 266 (1948)

Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B 1981)

Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980)

JOHN CHARLES BOGER
Attorney of Record for
Petitioner-Appellant

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8611

JOHN ELDON SMITH,

Petitioner-Appellant,

-against-

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent-Appellee.

On Appeal From The United States District Court
For The Middle District of Georgia
Macon Division

PETITIONER-APPELLANT'S SUGGESTION
FOR REHEARING EN BANC

STATEMENT OF THE ISSUES

(1) Whether the State's acknowledged threat to a key eyewitness--that he would be tried first and would likely receive a death sentence if he would not agree to testify against Petitioner--constituted a sufficient inducement for the witness' testimony against Petitioner to have required disclosure on cross-examination under Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959)?

(2) Whether an indigent habeas Petitioner can properly be held to have "abused the writ" under Rule 9(b) of the Rules Governing Section 2254 Cases and Sanders v. United States, 373 U.S. 1 (1963), by his failure to introduce complex social scientific evidence in support of his habeas claims in 1979, when the

research leading to that evidence had not even begun in 1979 and, through no fault of Petitioner's own, first became available only in 1982, after his initial federal claim had been adjudicated?

COURSE OF PRIOR PROCEEDINGS

Petitioner was convicted of two counts of murder in the Superior Court of Bibb County, Georgia on January 30, 1975. The Supreme Court of Georgia affirmed Petitioner's conviction and sentences on January 6, 1976 in Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), cert. denied, Smith v. Georgia, 428 U.S. 910 (1976).

On October 22, 1976, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. That court entered an unpublished order on March 16, 1977, dismissing the petition. The Supreme Court of Georgia affirmed on October 18, 1977 in Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), cert. denied, Smith v. Hopper, 436 U.S. 950 (1978).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Macon Division, on February 21, 1979. A United States Magistrate denied an evidentiary hearing and recommended a denial of relief in an order entered September 9, 1980. The District Court thereafter denied relief on November 26, 1980 in an unreported order and judgment.

This Court affirmed on November 2, 1981 in Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified on reh'g, 671 F.2d 858 (5th Cir. Unit B 1982), cert. denied, ___U.S.___, 103 S.Ct. 181 (1983).

On June 25, 1982 while his federal appeal was pending, Petitioner filed a successive state habeas petition raising three newly available federal constitutional claims. The Superior Court immediately dismissed the writ. Petitioner appealed to the Georgia Supreme Court which, on September 16, 1982, entered an unpublished order remanding the case for an "evidentiary hearing on the issues

raised in the Petition." On remand, the Superior Court entered an unpublished order denying Petitioner an evidentiary hearing and dismissing his claims as successive and as waived under O.C.G.A. §9-14-51 (Michie 1982). The Georgia Supreme Court reversed on March 1, 1983, and again remanded the case to the Superior Court, directing an evidentiary hearing on Petitioner's claim of prosecutorial misconduct under Giglio v. United States, 405 U.S. 150 (1972). Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983).

After an evidentiary hearing on May 10 and June 13, 1983, the Superior Court entered an unpublished order on August 5, 1983, denying relief. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal on August 16, 1983.

The following day, August 17, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Macon Division. The Court entertained oral argument from counsel the same day. On August 19, 1983, the District Court entered one order denying an evidentiary hearing and a second order dismissing the petition, denying a certificate of probable cause, denying leave to proceed in forma pauperis, and denying a stay of execution pending appeal.

Petitioner immediately filed a notice of appeal, and on August 22, 1983, applied to this Court for a certificate of probable cause to appeal and related relief. After hearing oral argument from counsel on August 23, 1983, the Court entered an order later on August 23rd, granting a certificate of probable cause to appeal, leave to proceed in forma pauperis, and a stay of execution. Justice Powell entered an order declining respondent's application to vacate this Court's order on August 24, 1983. Kemp v. Smith, A.-133, ____U.S.____(August 24, 1983).

After receiving further briefs from the parties on August 29, 1983, a panel of this Court affirmed the judgment of the District Court in a 2-to-1 decision

rendered September 9, 1983.

STATEMENT OF FACTS

The Giglio Claim

The key to the State's case against John Smith was the testimony of John Maree, an undisputed participant in the crime (i) whose handprint was found on the victim's automobile, (ii) who had given an extensive confession implicating himself, and (iii) who had been identified by a resident near the scene of the crime. Petitioner has consistently maintained his innocence, and apart from Maree's testimony, no other State's witness, nor any of the physical evidence, placed Petitioner at the crime scene.

During Petitioner's trial, John Maree told the jury that Petitioner fired the shotgun blasts that killed the victim while he, Maree, stood by. On cross-examination defense counsel attempted to learn whether Maree's testimony against Petitioner had been prompted by any inducements:

> Q: [Defense Counsel] How many times have you talked to [Chief Deputy Sheriff] Mr. Ray Wilkes about this case?
>
> A: Five or six times.
>
> Q: How many times have you talked to [District Attorney] Mr. Fred Hasty about it?
>
> A: Possibly twice, I think, twice, yes sir.
>
> Q: How many times have you talked to [District Attorney] Mr. Don Thompson who is connected with Mr. Hasty?
>
> A: Once alone with Mr. Wilkes being there and once with Mr. Hasty.
>
> Q: At the time that you talked with Mr. Wilkes in exchange for your statement, were you promised anything?
>
> A: The only thing that was promised me was protection for my family and myself. There were threats involved in this thing.
>
> Q: How about in respect to your liberties, your freedom?
>
> A: Nothing has ever been said of that.

During his closing argument, the District Attorney strongly reinforced the suggestion that Maree's testimony was volunteered independently without any inducement by the State:

> "I want to tell you one other thing and I am taking up too much of your time. This indictment charges John Eldon Smith a/k/a Machetti, Rebecca Smith a/k/a Machetti, and John Maree, Jr. with the offense of murder in two counts. . . As District Attorney of this Circuit, I tell you that those other two defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder. . . . You heard his testimony that he was promised protection for his family. Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise."

(St. Hab. I, Pet. Ex. 10, at 669).

Seven years after Petitioner's trial--long after Petitioner's initial state and federal habeas corpus proceedings had been brought--the former District Attorney who had tried Petitioner admitted during a conversation with an old acquaintance, Millard Farmer, that he had bargained with John Maree, prior to Petitioner's trial, to recommend life sentences for him if he would testify against Petitioner (St. Hab. I, at 81; see also St. Hab. II, at 102). District Attorney Hasty's admission was reduced by Petitioner's attorneys to affidavit form. Hasty "read over [the affidavit]. I thought it was true, and I signed it." (St. Hab., II, at 105). Hasty admitted that he understood at the time that Petitioner's lawyers "wanted to consider using it in a habeas corpus petition" (id.; see also, St. Hab. I, at 100). Hasty's affidavit included the following averments:

> "3. Prior to the trial of John Smith, I offered John Maree, the only known eyewitness to the crime, sentences of life imprisonment in exchange for testimony against John Smith and Rebecca Smith/Machetti. Mr. Maree agreed to testify against both John Smith and Rebecca Machetti in exchange for sentences of life imprisonment. I further told John Maree that I would seek the death penalty against him if he did not testify in the trials of John Smith and Rebecca Smith/Machetti. After the trials, John Maree was in fact permitted to plead guilty and did receive sentences of life imprisonment for his role in the Akins murders."

On June 21, 1982, nearly one month after Hasty had executed the affidavit, one of Petitioner's attorneys telephoned Hasty and indicated that his affidavit was to be filed in connection with a state habeas corpus petition asserting a Giglio v. United States claim (St. Hab. I, at 37). Hasty indicated no objections or hesitation about the use of his affidavit. Four days later, a state habeas petition was filed. Petitioner pursued state habeas proceedings on that claim for eight months, during which time Hasty contacted neither Petitioner, Petitioner's counsel, the State Attorney General, the Superior Court, nor the Supreme Court of Georgia to indicate any hesitancy about the affidavit.[1/]

However, on January 12, 1983, Hasty "opened an envelope addressed to me . . . and found that there was a letter from the State Disciplinary Board of the Bar Association." (St. Hab. I, at 84; St. Hab. II, at 110). That letter, announcing the institution of disciplinary proceedings, relied expressly upon the contradiction between Hasty's affidavit, Maree's cross-examination, Hasty's closing argument, and also an excerpt from a 1978 deposition, given by Fred Hasty in the state habeas proceedings of Petitioner's co-indictee, in which Hasty had admitted to making a pretrial deal with John Maree.

Subsequently, during Petitioner's state habeas hearing on May 10, 1983, as two State Disciplinary investigators sat in the courtroom and took notes (see St. Hab. I, 123, 131-37), Fred Hasty repudiated both his deposition and his Affidavit, stating that he had not promised John Maree anything in exchange for his testimony, neither a lighter sentence nor a letter to the parole board. (St. Hab. I, at 76). Hasty explained his radically inconsistent prior statements by suggesting: (i) that he had known prior to Petitioner's trial that he would recommend life for

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1/ Hasty alleged that he informed Farmer in July of 1982 that the affidavit was inaccurate, but he admittedly took no steps at all to stop its subsequent use even though he knew state habeas proceedings were continuing during the fall of 1982.

Maree if he testified against the Smiths (St. Hab. I, at 77); (ii) that he had not told either Maree or Maree's counsel what he intended to do (St. Hab. I, 77-78); but (iii) that after the trial, his "mind had become somewhat confused about what had actually happened. I think that what I had intended to do and what I actually did had become somewhat merged in my mind." (St. Hab. I, at 81).

While Hasty thus denied that any formal agreement had been made to grant Maree life sentences in exchange for his testimony against Petitioner, (St. Hab. I, 76-77)(Hasty); see also (St. Hab. II, 9-10)(Maree), another sort of understanding or arrangement was acknowledged. As John Maree explained in a sworn affidavit submitted by the State:

> The only statement made pertaining to my trial was that if I did not agree to testify, that then D.A. (Fred Hasty) would assign my case to an assistant district attorney for prosecution and that a death sentence would most likely be sought.

(St. Hab. I, Resp. Ex. 1). Willis Sparks, Maree's attorney in 1975, concurred with this account of the pretrial understanding:

> "Mr. Hasty did say, as I recall, that if Mr. Morray [sic] did not cooperate, it was quite possible that he would be the first man tried, and the State might well seek the death penalty."

(St. Hab. I, at 51)(See Super. Ct. Order, 5-6, confirming Spark's testimony).

Petitioner's Arbitrariness and Discrimination Claim

In his initial state and federal habeas corpus proceedings Petitioner asserted a claim that capital punishment is being imposed in the State of Georgia in an arbitrary and racially discriminatory pattern in violation of the Eighth and Fourteenth Amendments. Petitioner presented to the state court all evidence available to him as an indigent in support of this claim. In federal court, the United States Magistrate conducted no evidentiary hearing, but instead entered proposed findings rejecting Petitioner's statistical case as a matter of law in

reliance upon the former Fifth Circuit's holding in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The District Court adopted the Magistrate's recommendation. On appeal, this Court "acknowledged that under long-existing precedent, in certain instances, 'statistical evidence of racially disproportionate impact may be so strong that the results permit no other inference but that they are the product of a racially discriminatory intent or purpose.'" Smith v. Kemp, No. 83-8611, slip op. at 19. This Court nevertheless faulted Petitioner's documentary proffer for its failure to address certain evidentiary issues which the Court outlined in Smith on rehearing.

Shortly thereafter, new and independently conducted social scientific evidence became available to Petitioner: two impeccably conducted, comprehensive studies of the Georgia charging and sentencing system, begun in 1979, which specifically addressed the factual questions identified by this Court in Smith. These studies, conducted by Professor David C. Baldus and associates, gathered data from official Georgia sources on a large sample of all murder and voluntary manslaughter cases in Georgia during the 1973-1979 period. The studies have collected hundreds of items of information on each case, including the presence or absence of aggravating and mitigating circumstances, the backgrounds and characters of the defendants and the victims, the strength of the evidence and other relevant information. The studies have followed each case from the indictment stage through the sentencing outcome, obtaining information on plea bargaining decisions, jury conviction decisions, and penalty decisions. After analysis of these data, Professor Baldus has concluded that real and significant racial disparities -- particularly disparities based upon race of the victim (and upon race of the defendant if the victim is white) -- characterize Georgia's capital system, even when a host of significant possible alternative explanations for the disparities

have been taken into account.

Petitioner presented these new data in his successive state habeas corpus petition filed in June, 1982, annexing a preliminary report from Professor Baldus as Exhibit E to the petition. The Superior Court dismissed the claim without a hearing. The Supreme Court of Georgia affirmed on state res judicata grounds, holding that

> "Since. . . the ground has previously been raised and rejected, it is not cognizable in a successive petition under the requirements of OCGA 89-14-51, and was properly dismissed. If the rule were otherwise, a 'new study' could be produced quarterly by another investigator using more detailed data to form the basis of yet another habeas petition."

Smith v. Zant, 301 S.E. 2d 32, 35 (1983).

In the District Court, Petitioner re-pleaded this claim, explaining the recent development of these new facts. He moved orally and in writing for a hearing on the Baldus studies (Motion for an Evidentiary Hearing, 3-4). Petitioner also called the District Court's attention to a two-week evidentiary hearing begun on August 8, 1983 on the Baldus studies in response to a virtually identical claim asserted in a capital case in the Northern District of Georgia, McCleskey v. Zant, No. C81-2434A (N.D. Ga. 1983). Petitioner annexed to his petition a comprehensive table of contents from Professor Baldus' preliminary report in order to demonstrate the breadth and depth of the studies, and he noted that the District Court could choose either to hear such testimony or alternatively, "could direct transcription of the evidentiary proceedings in McCleskey v. Zant . . .[so that] Petitioner could offer those documentary materials under Rule 7 of the Rules Governing Section 2254 Cases for consideration by this Court." (Motion for an Evidentiary Hearing, at 3). The District Court summarily dismissed this claim without reaching its merits.

ARGUMENT

I

THE DISTRICT ATTORNEY'S UNDISCLOSED THREATS MADE TO INDUCE TESTIMONY FROM A KEY WITNESS AGAINST PETITIONER SHOULD HAVE BEEN DISCLOSED UNDER GIGLIO V. UNITED STATES, 405 U.S. 150 (1972)

Petitioner has consistently asserted two Giglio violations. The panel majority held that the first violation -- District Attorney Hasty's express promise to witness Maree -- "was resolved by a state court's findings of fact," under Sumner v. Mata (I), 449 U.S. 539 (1981), Smith v. Kemp, supra, slip op. at 3. The second violation, however -- the State's failure to disclose its pretrial threat which induced Maree's testimony -- depends upon undisputed record facts. Sumner therefore does not control, and the federal courts must independently assess whether the record facts make out a Giglio claim.[2/] See, e.g., Sumner v. Mata (II), 455 U.S. 591, 597 (1982) (per curiam).

The panel majority rejected this second claim, concluding that "[n]othing stated to Maree was concealed from the jury," Smith v. Kemp, supra, slip op. at 14, since "Maree's testimony at trial made it abundantly clear that he was subject to prosecution," id. This analysis, however, misperceives the full requirements of Giglio, since Petitioner's jury never knew that Maree was not merely subject to prosecution, but that the District Attorney had explicitly threatened him with prosecution, and with a death sentence, if he did not testify.

Under the principles of Giglio, there is "no difference between concealment of a promise of leniency and concealment of a threat to prosecute," United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976). The misrepresentation imparted to

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2/ The opinion of the Superior Court of Butts County never addressed, and thus never resolved, this second claim. The District Court, misreading the record and erroneously concluding that no pretrial threat had been made, also failed to rule on this second Giglio claim. See Dist. Ct. Order, at 7.

Petitioner's jury began when Maree, on cross-examination, stated: "The only thing that was promised to me was protection for my family and myself," (Trial Tr. at 370). In fact, Maree knew that if he had not testified against Petitioner, he would have been tried first; his cooperation was induced by Fred Hasty's agreement to leave the disposition of Maree's case open until after Petitioner's trial. Although not as startling as a hard-and-fast deal, "[o]ne can hardly imagine a more compelling fact that the jury should have had in order to properly evaluate whether a witness of doubtful credibility was in fact being credible in his trial testimony," United States v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977), since it gave Maree the greatest possible incentive to testify in a manner detrimental to Petitioner and pleasing to the District Attorney. Indeed, courts have recognized that often, "the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M. D. La. 1980), aff'd, 654 F.2d 718 (5th Cir. 1981).

Maree furthered the misimpression his testimony gave to the jury as defense counsel pressed him on cross-examination:

> "Q: How about in respect to your liberties, your freedom?
>
> A: Nothing has ever been said of that."

Id. In truth, Maree had been told by the District Attorney that a death sentence -- the ultimate deprivation of liberty -- "most likely" faced him unless he testified for the State. The fact that this testimony may not have been technically perjurous, of course, is not decisive. The Supreme Court has condemned "testimony [that], taken as a whole, gave the jury [a] false impression," Alcorta v. Texas, 355 U.S. 28, 31 (1957), even if not literally false.

The jury's impression that Maree was testifying without any inducement from the District Attorney was further heightened by Hasty's own closing argument, in which he assured the jury: "As District Attorney of this Circuit I tell you that

that those other two defendants will be tried and I tell you if I have anything to do with it those two defendants will be convicted of Murder" (May 10, 1983 Hearing, Pet. Ex. 10, at 165-66). The clear impression deliberately conveyed to the jury was that Fred Hasty intended to prosecute both Rebecca Machetti and John Maree just as Petitioner was being prosecuted -- brought before a jury to be tried for murder, and if convicted, to face a death sentence. Yet Fred Hasty has since acknowledged that "earlier in my mind, I had known that if [Maree] testified that I was going to make a recommendation of concurrent life sentences," (May 10, 1983 Hearing, 77-78). Thus Hasty knew to a certainty that Maree would never be "tried" for murder, since Hasty himself fully intended, even as he made his closing argument to Petitioner's jury, to offer him a plea to life imprisonment.

Hasty's phony speculations on Maree's possible motives for testifying -- "you have to understand in his testimony that he is hoping to save himself from the electric chair. It is the human reaction. It is natural for him to hope that, but he told you, and I can tell you, there have been no promises." (May 10, 1983 Hearing, Pet. Ex. 10, at 166) -- were also deliberate and contrived. In truth, while no explicit promise had been made, Hasty knew that Maree's testimony had been induced by far more than a "natural" human hope, but by the sure and certain knowledge imparted to him directly by the District Attorney that if he would not testify, he would be tried first, and perhaps face a death sentence.

It is these deliberately orchestrated misimpressions that constitute the Giglio violation in this case. Petitioner's jury was entitled to full knowledge of the threats and inducements under which Maree testified. Where "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors . . . that a defendant's life or liberty may depend," Napue v. Illinois, supra, 360 U.S. at 269,

such concealment cannot be tolerated. This claim plainly merits en banc review.

II

NO "ABUSE OF THE WRIT" CAN BE ATTRIBUTED TO PETITIONER'S FAILURE, AS AN INDIGENT, TO PRESENT EVIDENCE WHICH WAS CLEARLY UNAVAILABLE TO HIM AT THE TIME OF HIS INITIAL HABEAS PROCEEDING

This Circuit has long held that the "'abuse of the Writ' doctrine is of rare and extraordinary application," Simpson v. Wainwright, 488 F.2d 494, 495 (5th Cir. 1973); Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir.), cert. denied, 449 U.S. 885 (1980); accord Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B 1981). The Court has applied the abuse doctrine only in instances of "[i]nexcusable neglect or intentional withholding of a claim or error," Paprskar v. Estelle, supra, 612 F.2d at 1007. Nothing in the record before the District Court suggested that Petitioner was guilty of either neglect or of withholding available evidence during his initial habeas proceeding. To the contrary, Petitioner's unrebutted evidence showed that the new studies which meet the burden of proof outlined in Smith v. Balkcom "first became available in May 1982," Aff. Supporting Petition at 1. Scarcely one month later, Petitioner submitted this evidence to the state courts for review. Petitioner is indigent, and has been at all stages of the state and federal proceedings in this case. Surely, no fair application of the Rule 9(b) standard could require a Petitioner without any financial resources to have presented in 1976 (in state court) or in 1979 (in federal court) sophisticated social science research which was not even begun until later in 1979 and was not completed until 1982 or 1983.

The panel majority suggested that this new evidence is "merely . . .a modified and expanded version of statistics already rejected by this court . . .drawn from the same records that were available to him" in his initial habeas application, Smith v. Kemp, supra, slip op. at 20. The majority misreads the factual record. The newly available evidence is drawn from totally different data sources than the

earlier, more tentative studies; it contains hundreds of items of information on each case, directly responsive to this Court's opinion in Smith on rehearing. None of these definitive statistical analyses were within Petitioner's reach until this evidence had been assembled after years of intensive academic effort, undertaken in reliance upon extensive foundation grants and support.

If a real question exists whether Petitioner could reasonably have presented this evidence earlier -- and none was raised below -- the District Court's clear duty under the law of this Circuit was to conduct a hearing on the abuse issue before dismissing the claim under Rule 9(b). See, Price v. Johnston, 334 U.S. 266, 291 (1948); Potts v. Zant, supra, 638 F.2d at 748-9; Thomas v. Zant, 697 F.2d 977, 986-87 (11th Cir. 1983). To the extent its summary dismissal of the claim was based on a finding of abuse, the District Court ignored the established law of this Circuit.

CONCLUSION

This Court should order Petitioner's appeal to be reheard en banc.

Dated: September 13, 1983.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER-APPELLANT

BY: _____
JOHN CHARLES BOGER

CERTIFICATE OF SERVICE

I hereby certify that I am one of the attorneys for Petitioner-Appellant, and that I have served the annexed suggestion for rehearing en banc on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square S.W.
Atlanta, Georgia 30334

Done this 13th day of September, 1983.

John Charles Boger

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8611

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
SEP 15 1983
Spencer D. Mercer
Clerk

JOHN ELDON SMITH,

Petitioner-Appellant,

versus

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before RONEY, HILL and HATCHETT, Circuit Judges.

On August 23, 1983, this court granted a stay of execution.

Thereafter the court took the appeal under consideration on the merits.

On September 9, 1983, the judgment of the court, affirming the district court's judgment, with the majority's statement of reasons therefor and a dissent attached, was filed with the clerk and furnished to the parties. In the same document, the court states that the stay, theretofore granted, is vacated.

The mandate has not issued.

It is ORDERED that the stay of execution is reinstated and shall remain in effect until the mandate issues.

A. —

A126

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RALPH M. KEMP, Superintendent,
Georgia Diagnostic & Classification
Center,

Petitioner,

-against-

JOHN ELDON SMITH,

Respondent.

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SUPREME COURT, U.S.

RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO VACATE STAY OF EXECUTION

Respondent John Eldon Smith ("respondent") submits this response in opposition to an application filed in this Court by petitioner Ralph M. Kemp, Superintendent ("petitioner") on September 16, 1983, which requests the Court to vacate a stay entered by the United States Court of Appeals for the Eleventh Circuit on September 15, 1983. The Eleventh Circuit's order was entered in response to a motion, filed by respondent on September 13, 1983, which requested a stay "pending the Court's action on his suggestion for rehearing en banc and, if rehearing is granted, pending final determination of petitioner's appeal," Motion for a Stay of Execution, at 2.

The Attorney General's argument to this Court is three-fold: (i) that the Eleventh Circuit has granted "an unlimited stay," Petitioner's Application, at 14; (ii) that the stay "is in conflict with the guidelines set forth by this Court in Barefoot [v. Estelle]," id. at 18; and (iii) that the stay is therefore an abuse of discretion, id. at 20. Each of these contentions is incorrect, and the Attorney General's application should therefore be denied.

The full Court of Appeals for the Eleventh Circuit presently has under consideration a timely suggestion for rehearing en banc of respondent's appeal, which was affirmed by a divided panel on September 9, 1983. To preserve the jurisdiction of the Court in the face of respondent's approaching execution, the original panel has unanimously decided, pursuant to statutory authority granted by Congress under 28 U.S.C. §2251, to enter a limited stay of execution, to terminate by its express terms when "the mandate issues." Nothing in this Court's Barefoot opinion purports to address, much less to limit, the statutory authority of a court of appeals to consider a suggestion for rehearing en banc or, upon determination that the full Court should pass upon an appeal, to order rehearing en banc. See 28 U.S.C. §46(c); Rule 35, F.R. App. P. Thus, no "abuse of discretion" can be found in the decision of the Court of Appeals to grant a limited stay while it determines whether or not to exercise the important responsibilies expressly entrusted to it by Congress.

The Attorney General's application simply urges this Court -- without any precedent or justification -- to divest the Court of Appeals of jurisdiction over this pending appeal by permitting respondent's execution to go forward before the Court rules on respondent's suggestion for rehearing. The Attorney General recommends that this Court act without benefit of the full record on appeal and without waiting to learn whether the Court of Appeals itself intends to hear respondent's appeal en banc. This Court should decline to follow the Attorney General's rash and unwarranted suggestion.

Procedural History

Respondent filed the present habeas corpus claims in June of 1982 shortly after (i) he learned of newly discovered evidence strongly suggesting that the District Attorney who had

prosecuted him permitted false and misleading evidence to be presented to his trial jury and (ii) he received two major, impeccably conducted social scientific studies that offer comprehensive proof of racial discrimination in Georgia's capital charging and sentencing system. The Georgia Supreme Court directed an evidentiary hearing on the prosecutorial misconduct claim, holding that, "[i]f true . . . [it] presents a serious constitutional issue [under] Napue v. Illinois, 360 U.S. 264 (1958); Giglio v. United States, 405 U.S. 150 (1972)," which "could not reasonably have been raised in [respondent Smith's] . . . original habeas petition," since it had been concealed by the State until mid-1982. Smith v. Zant, 250 U.S. 645, 650-52, 301 S.E.2d 32, 36-37 (1983). The Georgia Court denied an evidentiary hearing on respondent's new evidence of systemwide arbitrariness and racial discrimination, relying on state res judicata principles. Id. On remand, following an evidentiary hearing on the Giglio issue, the Superior Court denied relief in an unpublished order, without ever addressing or resolving one of respondent's two related Giglio claims, and the Georgia Supreme Court denied a certificate of probable cause to appeal.

Respondent Smith immediately filed a federal habeas corpus petition in the United States District Court for the Middle District of Georgia. The District Court denied relief two days later without any evidentiary hearing. In its unpublished order, the District Court failed to address respondent's second Giglio claim and dismissed respondent's newly available evidence of systemwide arbitariness and discrimination in reliance on res judicata principles.

A divided panel of the Court of Appeals, after receiving briefs and hearing two-and-one-half hours of oral argument from counsel, granted a certificate of probable cause to appeal and a stay of execution pending appeal on August 23, 1983. This Court

declined to vacate that order upon application of the Attorney General. Kemp v. Smith, A. 133 (U.S. August 24, 1983). The Court of Appeals received further briefs from the parties on August 29, 1983, and thereafter, on September 9, 1983, rendered a divided opinion, affirming the District Court by a two-to-one vote and vacating its stay of execution. An Assistant Attorney General telephoned counsel for respondent Smith on the afternoon of September 9th to inform him that a new execution date had been set for September 21, 1983. Counsel for respondent noted that the mandate had not issued, that he intended to file a suggestion for rehearing en banc, and that it was inappropriate to set a new execution date precipitously under those circumstances. The Assistant Attorney General disagreed.

The following Tuesday, September 13, 1983, respondent filed a suggestion for rehearing en banc with the full Eleventh Circuit, which was assembled in Atlanta, Georgia for a week of en banc arguments. Respondent also moved for a stay of execution to permit the Court of Appeals an opportunity to consider the suggestion. Two days later, on Thursday, September 15, 1983, the original panel unanimously reinstated its stay until issuance of the Court's mandate. The suggestion for rehearing en banc is still pending before the full Court of Appeals.

REASONS FOR DENYING THE APPLICATION

In his application to this Court, the Attorney General has mischaracterized the facts and misstated the law in an effort to transform the Court of Appeals' action into an abuse of discretion. In truth, the stay is a limited, prudent and wholly justified exercise of a court's inherent right to preserve its jurisdiction while it gives respondent's suggestion "the careful attention that [it] . . . deserves." Barefoot v. Estelle, __U.S. __, 51 U.S.L.W. 5189, 5192 (U.S. June 28, 1983). In arguing the contrary position, the Attorney General first asserts that the action of the circuit panel in this case creates an "unlimited

stay of execution." The assertion is inaccurate. The order, by its terms, continues the stay only until issuance of the court's mandate. Under F.R. App. P. 41(a), if the Court of Appeals were to determine that the appeal should be reheard en banc, the mandate would, of course, not issue until after a final judgment had been rendered by the full Court. If the suggestion for en banc rehearing were denied, however, the mandate would "issue 7 days after entry of the order denying the petition," unless respondent sought a "stay of the mandate pending application to the Supreme Court for a writ of certiorari." F.R. App. P. 41(c).

The Attorney General's strong suggestion to the contrary notwithstanding, see Petitioner's Application, at 18, the Court of Appeals in granting the present stay, has obviously neither addressed nor decided the separate legal question of whether a stay of the mandate would be warranted pending certiorari. The evident purpose of the present stay is to preserve the jurisdiction of the full Court of Appeals on rehearing. It is not an "unlimited" stay, and simply cannot be read to have predetermined any procedural questions that might be presented at a later time, after the Court of Appeals has acted on respondent's suggestion.

The Attorney General's second argument is that the reinstatement of the stay of execution "was improper under this Court's decision in Barefoot v. Estelle," Petitioner's Application, 14. The Attorney General's only direct citation to the Barefoot opinion is to a guideline on whether a stay should issue in the first instance on the appeal of a successive petition. Yet this Court has already determined that the issuance of a stay on this appeal did not constitute an abuse of discretion. Kemp v. Smith, A. 133, at 2 (August 24, 1983). Thereafter, the Court of Appeals affirmed the District Court in a sharply divided panel opinion. As respondent contended in his suggestion for rehearing en banc, the panel majority either misunderstood the factual record or seriously misapplied Giglio v. United States, 450 U.S. 150 (1972),

since it held to be unobjectionable a carefully orchestrated series of misstatements by the District Attorney, designed gravely to misinform respondent's jury concerning the threats and inducements under which a key witness had testified against respondent. See Suggestion for Rehearing, 4-7, 10-13. Respondent also contended to the full Court that the panel majority had fundamentally misunderstood the nature of his newly available social scientific evidence, assuming that it was no more than "a modified and expanded version of statistics already rejected by this court . . . drawn from the same records that were available to him" on his initial habeas appeal. In truth, respondent's new evidence is drawn from totally different data sources -- official records of Georgia state and county agencies -- and it includes a wealth of information on each case never before assembled. If the panel majority's conclusion was that respondent, although an indigent, had abused the writ by not himself obtaining this information in 1979 at the time of his initial federal habeas application, respondent has urged in his suggestion for rehearing that such an opinion would violate settled Supreme Court and circuit court law governing abuse of the writ. Sanders v. United States, 373 U.S. 1 (1963), Potts v. Zant, 638 F.2d 727 (5th Cir. Unit B 1981), and Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980). See Suggestion for Rehearing, 7-9, 13-14.

Respondent believes that these questions constitute serious ground upon which to urge rehearing en banc. The full Court of Appeals, which received respondent's suggestion on Tuesday, September 13th, obviously chose not to reject them summarily. Unless a more stringent standard governs the discretion of the full Court of Appeals to consider rehearing en banc than governs a panel's discretion to consider the merits as an initial matter, no abuse of that discretion has occurred in reinstating a stay to permit the full Court a careful opportunity to consider respondent's suggestion. Barefoot suggests no such distinction.

The full Court of Appeals is clearly undertaking to complete its review of respondent's appeal, pursuant to its statutory responsibilites. To avoid imminent pressure of a pending execution, it has fashioned a limited stay of execution. This Court should not intervene to divest the Court of Appeals of its jurisdiction on rehearing without clear evidence of abuse wholly absent in this case.

CONCLUSION

The Attorney General's application should be denied.

Dated: September 16, 1983

Respectfully submitted

ROBERT C. GLUSTROM
116 Howard Avenue
Decatur, Georgia 30030

JACK GREENBERG
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40 Washington Square South
New York, New York 10012

ATTORNEYS FOR RESPONDENT

BY: John Charles Boger

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I have served the annexed Response in Opposition to Petitioner's Motion to Vacate Stay of Execution on petitioner, by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square S.W.
Atlanta, Georgia 30334

I have also given counsel telephonic notice of the contents of this opposition. Done this 16th day of September, 1983.



JOHN CHARLES BOGER

83-5544

83-5544

NOV 23 1983

Office - Supreme Court, U.S.
FILED
OCT 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN ELDON SMITH,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, John Eldon Smith, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Smith's affidavit in support of this motion will be forwarded to the Court upon receipt.

Dated: October 3, 1983

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019
(212) 586-8397

ATTORNEY FOR PETITIONER

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN ELDON SMITH,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

STATE OF NEW YORK)
:ss:
COUNTY OF NEW YORK)

JOHN CHARLES BOGER, being duly sworn, states:

1. I am counsel for John Eldon Smith in Smith v. Kemp. Mr. Smith has submitted a petition for writ of certiorari to this Court and I make this affidavit in support of Mr. Smith's motion for leave to proceed in forma pauperis. My representation of Mr. Smith is voluntary and without remuneration.

2. Mr. Smith is presently in the custody of the respondent Kemp at the Georgia Diagnostic & Classification Center, in Jackson, Georgia, under sentence of death and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Smith by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Smith is attached hereto.

3. I am informed and believe that because of his poverty, Mr. Smith is unable to pay the costs of this cause or to give security for same.

4. Mr. Smith has been permitted to proceed in forma pauperis throughout his state and federal post-conviction proceedings.

5. I believe that Mr. Smith is entitled to redress in this cause for the reason that his trial was conducted in violation of his rights under the Constitution of the United States.

JOHN CHARLES BOGER

Sworn to before me this 3rd day of October, 1983.

NOTARY PUBLIC

My commission expires:

GLORIA A. JONES
Notary Public, State of New York
No. 24-7113050
Qualified in Kings County
Commission Expires March 30, 1984

83-5544

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
OCT 17 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN ELDON SMITH,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

I, John Eldon Smith, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Bibb County, a trial court of the State of Georgia, of two counts of murder,

and was sentenced to death. I am being held at the Georgia Diagnostic & Classification Center in Jackson, Georgia. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentences were imposed upon me in violation of my constitutional rights.

John Eldon Smith
JOHN ELDON SMITH

STATE OF GEORGIA
COUNTY OF BUTTS

The foregoing affidavit of John Eldon Smith was subscribed and sworn to before me this 6 day of October, 1983.

Aaron D. Rogers
NOTARY PUBLIC
My Commission Expires
9-20-87

No. 83-5544

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
NOV 18 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN ELDON SMITH,

Petitioner,

-against-

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,

Respondent.

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, John Eldon Smith being first duly sworn, depose and say that I am the petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I believe that errors were committed during the course of my trial in the Superior Court of Bibb County, a trial court of the State of Georgia, where I was convicted of two counts of murder, and was sentenced to death. These errors violated my constitutional rights. Thus, my conviction and death sentences were imposed upon me in violation of my constitutional rights.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed.

a. The date of my last employment is: Oct. 15, 1974

The salary per month I received was: $1300.00

2. During the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other sources.

3. I do not own any cash or checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing).

5. There are no persons dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

John Eldon Smith

JOHN ELDON SMITH

Subscribed and sworn to before me this

31 day of October, 1983.

Aaron W. Rogozmoe

My Commission Expires 9-20-87

83-5544

FILED
OCT 17 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83- ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN ELDON SMITH,

Petitioner,

v.

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SUSAN V. BOLEYN
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for Respondent

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Attorney General

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Attorney General

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Please serve:

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Atlanta, Georgia 30334
(404) 656-3397

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied federal legal principles to the facts as fully developed in the state courts in determining that Petitioner had failed to establish a violation of Petitioner's due process rights under this Court's decision in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 762 (1972), and Napue v. Illinois, 360 U.S. 264,79 S.Ct. 1173 (1959)?

II.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner had failed to establish cause and prejudice under this Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977), so as to allow a consideration of Petitioner's claim of improper jury selection on its merits, where the right to litigate this claim had been waived as a matter of state law?

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NO. 83- ___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN ELDON SMITH,

Petitioner,

v.

RALPH M. KEMP, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, John Eldon Smith, a/k/a Anthony Isalldo Machetti, was convicted of two counts of murder in the Superior Court of Bibb County on January 27-30, 1975. Having found the Petitioner guilty of these murders, the jury found the presence of the statutory aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(4); Ga. Code Ann. § 27-2534.1(b)(4), i.e., that these murders had been committed for the purpose of receiving money or other things of monetary value. Having made this finding, a sentence of death was imposed on two counts of murder.

Briefly stated, Petitioner's wife, Rebecca Akins Smith Machetti, the Petitioner and a friend, John Maree, plotted the murder of Petitioner's wife's former husband, with the intent of redeeming the proceeds of the former husband's insurance policies whose beneficiaries were Mrs. Machetti and her three daughters. (Trial transcript, p. 402-403; 411-413; 815; 835). Petitioner was to share in the proceeds from the insurance policy with his wife and Mr. Maree was to profit by $1,000.00. (Trial transcript, p. 322-23; 325-26). There was also evidence that Petitioner was motivated by the possibility of enhancing his reputation as a "hit man" in the underworld, due to the murders. (Trial transcript, p. 326-27). The murder of Joseph Ronald Akins and his new wife of 27 days, Juanita Knight Akins, occurred on August 31, 1974, as the result of shotgun wounds administered at close range. (Trial Transcript, p. 200, 220-222, 334-39, 341-42, 502).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions and death sentences were upheld. Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), cert denied, 428 U.S. 910 (1976).

Next, Petitioner initiated state habeas corpus proceedings in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on November 30, 1976. At this hearing, Petitioner was represented by three attorneys and three witnesses, including Dr. Faye Goldberg and Mr. Hans Zeisel, testified in support of the allegations of the petition. Petitioner did not testify in his own behalf at the hearing.

On March 14, 1977, the state habeas corpus court denied relief to the Petitioner on all grounds raised in his petition. The Supreme Court of Georgia granted Petitioner's application for a certificate of probable cause to appeal from the denial of habeas corpus relief. The Supreme Court of Georgia affirmed the judgment of the state habeas corpus court

in Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), cert. denied, 436 U.S. 950 (1978).

Petitioner, represented by counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division, on February 21, 1979. An order was signed by the district court allowing Petitioner to proceed in forma pauperis on February 21, 1979 and a stay of execution was filed on the same date. An answer was filed on behalf of the Respondent in response to that petition on April 4, 1979.

By order of the district court dated April 21, 1980, Petitioner's federal habeas corpus petition was referred to the United States Magistrate for the submission of proposed findings of fact and recommendations for disposition to the district judge. On September 9, 1980, the magistrate filed proposed Findings of Fact and Conclusions of Law and recommended that the petition for a writ of habeas corpus be denied. Petitioner filed objections to the magistrate's proposed Findings of Fact and recommendations for disposition on October 20, 1980. On November 26, 1980, the district court, stating that it had carefully reviewed the magistrate's report and recommendation, adopted the report and recommendation as the opinion and order of the district court and denied Petitioner's habeas corpus petition. A motion for rehearing filed on behalf of the Petitioner was denied by the district court on December 5, 1980.

Petitioner, represented by counsel, appealed from the denial of federal habeas corpus relief to the United States Court of Appeals for the Fifth Circuit. Briefs were filed and oral argument was held in that court and the judgment of the district court denying federal habeas corpus relief was affirmed in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Petitioner filed a petition for rehearing which was denied in a separate opinion issued by the United States Court of Appeals

for the Fifth Circuit in Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982).

A stay of execution was granted by the United States Supreme Court on May 18, 1982, pending the filing of a petition for a writ of certiorari. The petition was filed on June 28, 1982, seeking review by the Supreme Court of the United States of the decision of the United States Court of Appeals for the Fifth Circuit. In his petition for a writ of certiorari, Petitioner raised certain issues which were also later raised in his successive habeas corpus petition filed in the Superior Court of Butts County. The petition for a writ of certiorari was denied on October 4, 1982.

On June 25, 1982, a successive petition for a writ of habeas corpus was presented on behalf of Petitioner in the Superior Court of Butts County, Georgia. The petition was dismissed without an opportunity for counsel for the Respondent to respond in any way to the allegations of the petition. Respondent presented the Superior Court of Butts County with a nunc pro tunc order withdrawing the court's initial order and declining to sanction the petition. Counsel for both parties filed applications for certificates of probable cause to appeal to the Supreme Court of Georgia. The Supreme Court of Georgia remanded this case to the lower court for an "evidentiary hearing" on the issues raised in Petitioner's second state habeas corpus petition.

The evidentiary hearing mandated by the Supreme Court of Georgia was scheduled for November 8, 1982. Following a prehearing conference, the Superior Court of Butts County determined that the scope of the hearing, as an initial matter, was to be limited to whether or not Petitioner had waived the right to present the grounds raised in his second habeas corpus petition, and whether Petitioner could reasonably have raised the grounds presented in his second habeas corpus petition, in his original habeas corpus petition. The Superior Court of Butts County specifically reserved the question of whether

there would be a further evidentiary hearing on the merits of the allegations of the second habeas corpus petition.

Following a hearing on the issue of waiver, the Superior Court of Butts County entered an order, dated November 15, 1982, finding with respect to each of the issues raised in Petitioner's second habeas corpus petition, that Petitioner had failed to show that these issues were constitutionally non-waivable and that Petitioner had failed to show that these issues could not reasonably been raised in his original habeas corpus petition which was filed in the Superior Court of Tattnall County, Georgia.

Petitioner appealed these two orders of the Superior Court of Butts County to the Supreme Court of Georgia. In Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983), the Supreme Court of Georgia found that with respect to Petitioner's allegation of an unconstitutionally composed jury that, "Petitioner has not shown grounds for raising this issue in his second habeas petition and the habeas court did not err in refusing to hear the matter on its merits." Smith v. Zant, supra at 647.

With respect to Petitioner's claim that the death penalty statute in Georgia is being applied arbitrarily and discriminatorily, the Supreme Court of Georgia, noting that this issue had been raised in Petitioner's first state habeas as well as in his first federal habeas petition, found that:

> Now, in his successive state habeas, Smith seeks to bolster his claim of discriminatory application with preliminary analysis of a more recent study. Since, however, the ground has previously been raised and rejected, it is not cognizable in a successive petition under the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127), and was properly dismissed. If the rule were otherwise, a "new study" could be

> produced quarterly by another investigator using more detailed data to form the basis of yet another habeas petition.

Id. at 648.

However, the Supreme Court of Georgia remanded the case to the Superior Court of Butts County by stating the following:

> We, therefore, hold that Smith has alleged facts, supported by affidavits, sufficient to satisfy the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127) to entitle him to a hearing on the merits of his false testimony claim, i.e., Petitioner has shown grounds for relief which could not reasonably have been raised in his original habeas petition. The habeas court erred in dismissing Smith's Napue-Giglio claim and we remand this case for a hearing on the merits of this issue. (Cites omitted).

Id. at 652.

Pursuant to the decision of the Supreme Court of Georgia in Smith v. Zant, supra, two evidentiary hearings were held in May and June of 1983 on the merits of the Giglio claim. On August 5, 1983, the Superior Court of Butts County entered an order finding that Petitioner's allegation was without merit, i.e, that Petitioner had failed to establish a "Napue-Giglio" claim and dissolved Petitioner's stay of execution.

A notice of appeal and application for certificate of probable cause to appeal were filed in the Supreme Court of Georgia on August 12, 1983. On August 16, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal.

On August 17, 1983, Petitioner filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and an

application for a stay of execution in the United States District Court for the Middle District of Georgia, Macon Division. On that same date, a hearing was conducted before the district court and counsel for the Petitioner and Respondent were allowed to present argument and/or evidence to the court for its review. After a two hour hearing before the district court, the district judge instructed counsel for both parties to present any further pleadings and/or documents to the court for its review by 5:00 p.m. on August 18, 1983. A complete record of all the prior proceedings described above was submitted to the district court for its consideration by counsel for both parties.

On August 19, 1983, the district court entered an order in which it found that consideration of two of Petitioner's issues was foreclosed and that the third issue raised by the Petitioner in his application for federal habeas corpus relief was without any "possible merit." In the district court's order of August 19, 1983, the district court not only denied Petitioner federal habeas corpus relief, but also denied Petitioner a certificate of probable cause to appeal in forma pauperis and denied Petitioner's motion to stay his execution. As the district court's order further noted, upon being advised of the entry of this order, counsel for the Petitioner moved the district court for a stay pending appeal to the Eleventh Circuit Court of Appeals, but the motion was denied.

Also on August 19, 1983, Petitioner filed a notice of appeal from the judgment of the district court. The filing, by Petitioner on August 22, 1983, of an application for a certificate of probable cause to appeal and an application for a stay of execution, followed the filing of Petitioner's notice of appeal. Petitioner also filed an application for leave to proceed in forma pauperis in the United States Court of Appeals for the Eleventh Circuit. Respondent filed a response to the application for a stay of execution and the application for a certificate of probable cause to appeal.

At 5:00 p.m. on August 22, 1983, Counsel for Respondent was informed that the United States Court of Appeals for the Eleventh Circuit desired oral argument to be conducted on August 23, 1983 at 11:00 a.m. in the United States Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Oral argument was heard by the United States Court of Appeals for the Eleventh Circuit from 11:00 a.m. to 1:30 p.m. on August 23, 1983. At 4:25 p.m. on August 23, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order granting Petitioner's motion for a stay of execution, granting Petitioner's application for certificate of probable cause to appeal, granting Petitioner's motion for leave to proceed in forma pauperis, and granting the motion of the Petitioner to file out-of-size Appendices. An application to vacate the stay of execution granted to Petitioner was denied by Mr. Justice Powell on September 14, 1983. Additional briefs were filed for Respondent and Petitioner on August 29, 1983, and August 30, 1983, respectively.

On September 9, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order dissolving the previously entered stay of execution and affirming the judgment of the district court denying federal habeas corpus relief.

On September 13, 1983, Petitioner John Eldon Smith filed a motion for a stay of execution until such time as the Eleventh Circuit ruled on the suggestion for rehearing en banc, said suggestion for rehearing en banc having also been filed on September 13, 1983. Respondent filed a response opposing the granting of a motion for stay of execution on September 14, 1983.

On September 15, 1983, a panel of the United States Court of Appeals reinstated the stay of execution until such time as the mandate issues. Respondent filed an application to vacate the stay of execution in this Court. The application was denied by Mr. Justice Powell on September 17, 1983 and by the full court on October 3, 1983.

Petitioner's petition for rehearing en banc was denied by the United States Court of Appeals for the Eleventh Circuit on September 29, 1983. Petitioner's motion for stay of the mandate was granted on October 7, 1983 by the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH A VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER GIGLIO V. UNITED STATES, 405 U.S. 150 (1972); AND NAPUE V. ILLINOIS, 360 U.S. 264 (1959).

Petitioner alleges that his constitutional rights to due process under Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959) were violated. Specifically, Petitioner alleges state's witness John Maree testified against Petitioner at his trial, "under the inducement both of a promise of life imprisonment and of a specific threat of initial prosecution and a likely death sentence unless he testified against Petitioner." (Brief of Petitioner, page 18). The United States Court of Appeals for the Eleventh Circuit found no violation of Giglio v. United States, supra, under either of these theories asserted by Petitioner. As the United States Court of Appeals for the Eleventh Circuit noted in Smith v. Kemp, No. 83-8611 (September 9, 1983, 11th Cir.), the essence of a Giglio violation is as follows:

> The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on the "impact on the jury." United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir. 1978); see United States v. Meinster, 619 F.2d 1041, 1044-45 (4th Cir. 1980). (Intent of Giglio "is not to punish the prosecutor; rather the primary concern is that the jury not be mislead by the prosecution's knowing use of perjured testimony."); United States v. Barham, 595 F.2d 231, 243 (5th Cir. 1979).

Smith v. Kemp, supra. Slip Op. at 5166.

In his petition for a writ of certiorari, Petitioner admits that the testimony of Maree "may not have been technically perjurous" (Petitioner's Brief, page 19), but alleges that this is not determinative of the issue before the Court. The essence of Petitioner's contention is that alleged "misimpressions" given to the jury constituted a Giglio violation. Respondent respectfully submits that it is clear that the United States Court of Appeals for the Eleventh Circuit found that under the facts as they were developed in the state courts, no Giglio violation occurred under either of the theories alleged by the Petitioner, i.e., alleged undisclosed promises or threats. Id. at 5166.

The United States Court of Appeals for the Eleventh Circuit properly applied the presumption of correctness to the state court's findings of fact, after having found that the state habeas corpus court afforded Petitioner a full and fair hearing. Smith v. Kemp, Slip Op. at 5163.

An opportunity for evidentiary development was provided to Petitioner with respect to the Giglio issue in the Superior Court of Butts County in May and June of 1983. The transcript of both of these hearings were provided to the United States Court of Appeals for the Eleventh Circuit. At these two hearings, numerous witnesses presented extensive testimony concerning Petitioner's Giglio claim. As the United States Court of Appeals for the Eleventh Circuit noted, "Indeed, every person in life who was suggested as having knowledge of the alleged deal appeared, in person, and gave testimony on direct and cross-examination." Smith v. Kemp, Slip Op. at 1562.

Included among these witnesses were the state's key eyewitness against Petitioner, co-perpetrator, John Maree; the prosecutor at Petitioner's trial, Fred Hasty; Willis Sparks, the attorney representing John Maree at the time of Petitioner's trial in the Superior Court of Bibb County; and Sheriff Ray Wilkes, who was involved in the investigation of the murders with which Petitioner and John Maree had been charged. Various pieces of documentary evidence were presented by counsel for both parties, including excerpts from Petitioner's original trial transcript in the Superior Court of Bibb County, Georgia, and the indictment and sentence of John Maree in the Superior Court of Bibb County, Georgia.

Each of the principle witnesses with respect to the Giglio issue was subjected to cross-examination by counsel for the Petitioner. Each hearing was lengthy and there was sufficient time between the two hearings for counsel for the Petitioner to make any further requests with reference to compelling the attendance of other witnesses and or producing other documentary evidence. Even after the conclusion of the second evidentiary hearing, the state habeas corpus court allowed counsel for the Petitioner an additional few days to determine whether or not he wished to take the deposition of Millard Farmer and submit it to the court for its consideration. (June 13, 1983 hearing, page 144-143).

The United States Court of Appeals for the Eleventh Circuit addressed each contention raised by Petitioner as to why the state habeas corpus hearings were not "full and fair" but properly rejected these contentions, having analyzed them fully, holding the following:

> We concluded the state habeas court afforded Petitioner a full and fair hearing on this contention. All witnesses desired by Petitioner were produced even where adjournment was required for their production. No admissible evidence offered by the Petitioner was excluded. The finding that there was not a pretrial agreement or promise to Maree was supported by all the sworn testimony and it was substantial. Absent a deal or promise, there was no Giglio violation arising from the failure of the prosecution to reveal one.

Smith v. Kemp, supra, Slip Op. at 5165.

In finding that there was no pretrial agreement or promise to state's witness John Maree, the United States Court of Appeals for the Eleventh Circuit reviewed the testimony of each of the witnesses at the state habeas corpus hearings and noted that in its order of August 5, 1983, the state habeas corpus court reached the following conclusion:

> Petitioner has failed to present evidence to this Court which would establish that the testimony of Mr. Maree given at Petitioner's trial was in fact false and known to be false by the prosecution so as to establish a constitutional violation in light of Giglio v. United States, 405 U.S. 150

(1972), or Napue v. Illinois, 360 U.S. 264 (1958). Therefore, this Court concludes that Petitioner was not deprived his right to a fair trial under due process principles.

(Order of State Habeas Court, dated August 5, 1983).

At the first habeas corpus hearing conducted on May 10. 1983 in the Superior Court of Bibb County, Georgia, concerning Petitoner's Giglio claim, Mr. Willis Sparks, who represented John Maree in 1974 on charges of murder lodged against him in the Superior Court of Bibb County, appeared and testified. Mr. Sparks stated that he was practicing law in 1974 and was appointed to represent Mr. Maree subsequent to the time that Maree gave a detailed confession to law enforcement authorities admitting his participation in the crimes with which Maree, Petitioner, and Petitioner's wife were charged. (May 10. 1983 hearing, page 37-49). As noted by the state habeas corpus court, at the time of Mr. Sparks appointment the cases of all three co-defendnts were pending. (May 10, 1983 hearing, page 49). Mr. Sparks testified that he viewed his task as obtaining the most favorable disposition of Maree's case possible under the circumstances. (May 10, 1983 hearing, page 50).

As noted by the state habeas corpus court and the United States Court of Appeals for the Eleventh Circuit, Sparks asked District Attorney Hasty point blank, What was in it for Maree if he testified against Petitioner?" (May 10, 1983 hearing, page 50). Mr. Sparks stated that Hasty's reply was that he would not make any agreement with the co-defendant before trial because that was not his practice. (May 10, 1983 hearing, page 50). Mr. Sparks also stated that throughout his discussions with the district attorney, Mr. Hasty was stead-fast that he would not make a deal in advance with a co-defendant. (May 10, 1983 hearing page 51). Smith v. Kemp, Slip Op. at 5162.

With respect to whether or not Assistant District Attorney Thompson ever made any promises to Maree in return for Maree's testimony against the Petitioner, Mr. Sparks stated that Thompson never made any promise to Maree because Hasty was "calling the shots" and Thompson deferred to Hasty. (May 10. 1983 hearing, page 53). Mr. Sparks further stated that no one from the district attorney's office in Bibb County made any promises to him as Maree's attorney. (May 10. 1983 hearing, page 54). Mr. Sparks also stated that he did not recall that Maree talked with anyone with whom he could have made a deal, as it was not the practice in Bibb County to "deal" with the Sheriff or Sheriff's deputies with reference to agreements to testify. (May 10, 1983 hearing, page 66-67).

Mr. Sparks' testimony shed light on the reasons for Maree's testimony against the Petitioner, as Mr. Sparks stated that he told Maree that he thought it would be in his best self-interest to testify against Petitioner because Maree had already given a confession, his palm print had already been found in the victim's car and there was some chance the state might seek the death penalty, even though the evidence did not appear to show that Maree was the triggerman. (May 10, 1983 hearing, page 51). Instead, Mr. Sparks testified that Maree's motivation for testifying against the Petitioner was that Maree was "in love" with one of Mrs. Machetti's daughters and Maree thought that Mrs. Machetti would murder that daughter if she were ever released. Later, Mr. Sparks stated that his client had reason to regret that he did not have a "deal" worked out with the prosecution and complained bitterly about the lack of agreement with the state. (May 10, 1983 hearing, page 51-52). Smith v. Kemp, supra. Slip Op. at 5163, n.4).

Mr. Fred M. Hasty, District Attorney of Bibb County at the time Petitioner was tried, stated that he knew what he was going to do with reference to the case pending against John Maree, if Maree testified against Petitioner, but that he did not discuss this with Mr. Sparks, who was the attorney

representing Mr. Maree. (May 10, 1983 hearing, page 77). Mr. Hasty reaffirmed the truthfulness of what he informed the jury, i.e., that no promises had been made with Petitioner and stated that his closing argument given at Petitioner's trial constituted the truth. (May 10, 1983 hearing, page 87). Mr. Hasty did recognize that he had given a contradictory statement in a deposition and an affidavit, but stated that he thought that these statements were true at the time that the made them, but recognized their falsity after reviewing his file and the transcript of Petitioner's trial. (May 10, 1983 hearing, page 88-89, 93). Mr. Hasty stated at the time he gave the contradictory statement, he had not reviewed his file or the transcript. (May 10, 1983 hearing, page 100-101). Smith v. Kemp, supra, Slip Op. at 5162.

As noted by the United States Court of Appeals for the Eleventh Circuit, Sheriff Ray Wilkes of Bibb County stated that he was Chief Deputy of Bibb County at the time the Petitioner was tried and was involved in the investigation of the murder. (June 13, 1983 hearing, page 139-140). Sheriff Wilkes stated that no promises were made to Maree prior to his giving his incriminatory statement, nor did any member of the Sheriff's office make any promise to Maree. (June 13, 1983 hearing, page 14-141). Smith v. Kemp, Slip Op. at 5163.

At Petitioner's insistence, John Maree appeared in person and testified at one of the state habeas corpus evidentiary hearings held in the Superior Court of Butts County, Georgia. The United States Court of Appeals for the Eleventh Circuit correctly characterized Petitioner's testimony as being "unequivocal." Id. Maree stated, "At the first trial, there was no question about testifying. I didn't have any real conversations regarding any kind of a deal whatsoever." (June 13, 1983 hearing, page 10). Mr. Maree stated that he had no discussions with Hasty concerning a life sentence in exchange for his testifying against Petitioner. (June 13, 1983 hearing, page 10). Maree stated that he had no expectations

prior to testifying against Petitioner at Petitioner's trial. (June 13, 1983 hearing, page 11). As noted by the United States Court of Appeals for the Eleventh Circuit, Maree stated that he testified against Petitioner on the advice of his attorney who told him it would be in his best interest to give full testimony. Id.

Having reviewed all of this extensive testimony, the United States Court of Appeals for the Eleventh Circuit properly found there to have been no Giglio violation based on the state habeas corpus court's conclusion that no promise had been made to or agreement had been made with the state witness John Maree. The United States Court of Appeals for the Eleventh Circuit properly noted:

> In so finding, the judge found in accordance with all the sworn testimony taken from all the witnesses who appeared before him. To have found to the contrary would have required a finding that each and every witness who knew the facts had lied in their testimony given at the hearing. Id.

Based on all of the evidence before the court, the United States Court of Appeals for the Eleventh Circuit properly found that there were no undisclosed promises or agreements established by Petitioner to support a finding that a Giglio violation had occurred. The United States Court of Appeals for the Eleventh Circuit went further and considered Petitioner's second contention that the alleged failure of the prosecution to reveal a "threat" against state witness John Maree violated Giglio v. United States, supra. The United States Court of Appeals for the Eleventh Circuit specifically looked at the closing argument given by the district attorney, which is quoted in pertinent part in Smith v. Kemp, supra, Slip Op. at 5165. The United States Court of Appeals for the Eleventh Circuit noted that based on the closing argument given by Hasty

at Petitioner's trial, "The threatened position of Maree was clear to the jury." Id. Specifically, the jury was informed about Maree's motivation as follows, "Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise." Id.

The United States Court of Appeals for the Eleventh Circuit, contrary to the assertion of the Petitioner, properly found that the jury was not mislead at all in this case, whether the alleged misimpressions revealed undisclosed threats or promises. The court found:

> In this case Maree's fears and aspirations were clear. The jury was made aware of Maree's situation and could test his credibility taking his threatened posture into consideration. Under the facts of this case, no Giglio violation occurred.

Smith v. Kemp, supra, Slip Op. at 5166.

Contrary to the allegations of Petitioner, the evidence developed in the state habeas corpus court does not establish any "deliberately orchestrated misimpressions" given to the jury by the district attorney either in his examination of state's witness John Maree or in his closing argument to the jury. Respondent does not disagree that Petitioner's jury was entitled to full knowledge of any threats or inducement under which Maree testified, but rather takes issue with Petitioner's assertions that there was not the full disclosure to the jury of possible motivations of Maree upon which to test his credibility.

In his petition for certiorari, Petitioner has cited the decision of this Court in Alcorta v. Texas, 355 U.S. 28, 31 (1957), for the proposition that a false impression, even if not literally false, can support a Giglio violation. The facts

in Alcorta v. Texas, supra, are clearly distinguishable from those established in this case. In Alcorta v. Texas, supra, the state prosecutor had promised the key state's witness "consideration," but did not correct false evidence introduced at trial by this key eyewitness. This Court found a due process violation based on the state allowing "false evidence" to go uncorrected. No "false evidence" was allowed to go uncorrected, nor were there any "false impressions" which could even arguably even supported a Giglio violation.

Petitioner cites the case of United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976), for the proposition that the concealment of a promise of leniency and the concealment of a threat to prosecute are indistinguishable. Respondent does not concede that there was any threat to prosecute in this case or that any such alleged threat was in fact concealed. However, United States v. Sutton, is clearly distinguishable from the facts of this case, as under the facts presented to the Court in United States v. Sutton, supra, the jury was assured that there had been no threats made to a witness when an FBI agent had in fact made an overt threat to such a witness. No such threat was in fact made in this case and as the United States Court of Appeals for the Eleventh Circuit properly found, the jury was well aware of all motivations which Maree might have for testifying against the Petitioner, which could affect his credibility.

Based on the extensive evidence presented in the state habeas corpus court, which was properly afforded the presumption of correctness by the district court and the United States Court of Appeals for the Eleventh Circuit, the Eleventh Circuit properly determined that Petitioner had failed as a factual matter to establish that the jury was mislead as to any alleged motivations for the giving of testimony by co-perpetrator John Maree against Petitioner at Petitioner's trial, so as to establish a violation of Petitioner's constitutional rights to due process. As the facts were

adequately developed in the state court and the district court and the facts were adequately reviewed by the appellate courts, which applied appropriate federal legal principles to these facts, this Court should decline to review this issue raised by Petitioner.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT PETITIONER WAS NOT ENTITLED TO LITIGATE THE MERITS OF HIS ALLEGED UNCONSTITUTIONALLY COMPOSED TRAVERSE JURY, AS PETITIONER HAD FAILED TO ESTABLISH ANY CIRCUMSTANCES WHICH WOULD EXEMPT HIM FROM HIS STATE PROCEDURAL DEFAULT.

Petitioner has alleged that this Court should grant certiorari to determine whether the refusal to adjudicate the merits of Petitioner's "admittedly valid challenge to the composition of his trial jury in light of a valid state procedural waiver rule is manifestly unjust under this Court's decision of Wainwright v. Sykes, 433 U.S. 72 (1977)." Respondent respectfully disagrees with this allegation made by Petitioner, especially that portion in which Petitioner alleges that he has now made an "admittedly valid challenge to the composition of his trial jury." Respondent has never conceded that any challenge to the traverse jury due to alleged underepresentation of women would have been "valid" with reference to Petitioner's case, as this issue has never been litigated in Pettioner's case on its merits. Therefore, Respondent respectfully submits that the validity of such a challenge in the context of Petitioner's case is not before the Court, but rather, this Court must determine whether the United States Court of Appeals for the Eleventh Circuit properly found that Petitioner had waived his right to have this claim considered on its merits.

The United States Court of Appeals for the Eleventh Circuit *properly found that, "It is clear from the record, and the* parties agree, that Smith made no objection to the jury composition because of underpresentation of women at or before his trial and therefore waived his right to assert the matter under state law. The question is therefore whether Smith is entitled under any theory to be relieved of his waiver of the claim and to assert the jury composition claim on this second petition for habeas corpus." Smith v. Kemp, supra, Slip Op. at 5169.

The Petitioner did not challenge the composition of the grand or traverse jury in Bibb County, Georgia, prior to his trial, as required by the long-standing rule of Georgia procedure which states that a defendant must challenge the jury composition at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. Both Georgia procedure and Federal procedure recognize a "cause" exception to the timeliness requirement. See Simmons v. State, 266 Ga. 110, 172 S.E.2d 680 (1980), and Francis v. Henderson, 425 U.S. 536, 542 (1976).

Not only did Petitioner fail to challenge the compositions of his grand or traverse juries prior to trial, but he also declined to raise an allegation concerning allegedly unconstitutional composition of the juries on direct appeal to the Supreme Court of Georgia, or in Petitioner's initial state habeas corpus action filed in the Superior Court of Tattnall County, Georgia. Additionally, Petitioner did not challenge the composition of the grand or traverse juries in Bibb County by means of his initial federal habeas corpus actions filed in the United States District Court for the Middle District of Georgia, Macon Division, nor did Petitioner attempt to establish "cause and prejudice" under Francis v. Henderson, supra, in order to seek to avoid the state procedural bar already imposed concerning this claim.

In January of 1975, some five days prior to Petitoner's trial, this Court held in Taylor v. Louisiana, 419 U.S. 522 (1975), that a statute automatically excluding women from jury service unless they opted to be included by request, a so-called "op-in statute," was unconstitutional. Petitioner was then tried, convicted and received the death penalty in the Superior Court of Bibb County. Following Petitioner's trial, his co-indictee, Rebecca Machetti, was convicted and sentenced in the Superior Court of Bibb County, receiving her sentence of death on March 1, 1975. That same year, a Georgia statute providing that women were to be automatically included in jury lists unless they opted not to serve, a so-called "op-out statute" as codified in Ga. Code Ann. § 59-124, was repealed. Subsequently, in January of 1979, this Court in Duren v. Missouri, 439 U.S. 357 (1979), held that a state statute which allowed women by request to opt-out of jury service was unconstitutional.

It was not until Petitioner's co-indictee, Rebecca Machetti, was granted federal habeas corpus relief by the United States Court of Appeals for the Fifth Circuit in Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), that Petitioner sought to litigate the alleged unconstitutional jury composition claim by raising this issue in a successive state habeas corpus petition filed in the Superior Court of Butts County. The United States Court of Appeals for the Eleventh Circuit noted that the state habeas corpus court, as did the Supreme Court of Georgia, applied the state procedural waiver rule and did not consider the alleged illegal jury composition issue on its merits. The federal district court also declined to consider the issue on its merits because the state courts had applied the state procedural waiver rule. Smith v. Kemp, supra, Slip Op. at 5170. The state procedural waiver rule was uniformally applied by all courts considering this issue after it was raised for the first time in Petitioner's successive state habeas corpus petition in Butts County, Georgia.

In United States v. Frady, 456 U.S. 152 (1982), cited by the United States Court of Appeals for the Eleventh Circuit, this Court found that before a federal court could consider the merits of Frady's complaint relating to allegedly erroneous jury instructions, in the presence of a contemporaneous objection rule applicable to state courts, Frady had to meet the "cause and actual prejudice" standard enunicated in Davis v. United States, 411 U.S. 233 (1973), and as extended in Francis v. Henderson, 425 U.S. 536 (1976) and Wainwright v. Sykes, 233 U.S. 72 (1977).

In United States v. Frady, supra, this Court found a "double procedural fault." In this case, Respondent submits that a "triple procedural default" is present. Further, Respondent submits that the United States Court of Appeals for the Eleventh Circuit acted properly in requiring that Petitioner demonstrate "cause and prejudice" before he could be exempted from the state procedural bar with reference to his jury composition claim and allow this claim to be considered on its merit.

In Engle v. Isaac, 456 U.S. 1078 (1981), this Court stated that, " . . . any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." The United States Court of Appeals for the Eleventh Circuit properly found that Petitioner had failed to establish "cause" within the meaning of this requirement, based on any of the assertions made in oral argument or in his brief presented to that court. Although this Court's decision in Taylor v. Louisiana, supra, was decided only six days prior to Petitioner's trial, the United States Court of Appeals properly cited this Court's decision in Engle v. Isaac, supra, and concluded that Petitioner's counsel's lack of awareness of the decision in Taylor v. Louisiana, supra, does not establish "cause."

Similarly, the United States Court of Appeals for the Eleventh Circuit properly rejected the assertion of "cause" made by Petitioner that there had been a supervening "change" in the law, finding that Petitioner's jury composition claim emanated directly from Taylor v. Louisiana, supra, which was cited by Petitioner in 1977 during the Supreme Court of Georgia's review of Petitioner's first state habeas corpus action. Id. at 5171.

In light of these facts and circumstances, the United States Court of Appeals for the Eleventh Circuit concluded:

> In this case, Smith cannot show "cause" for his procedural default such that a hearing on the merits is necessary to prevent a "miscarriage of justice," nor can he show that "actual prejudice" from the constitutional defect in jury selection affected his conviction.

Id. at 5171.

Respondent submits that this holding was proper and that if the doctrine of waiver as enunicated by this Court in Wainwright v. Sykes, supra, were not applied, the waiver principles would be undermined, as well as the demands of comity and finality often cited as important legal principles when examining federal legal review of state court convictions. Respondent submits that contrary to the assertions of the Petitioner, such decisions of this Court as Francis v. Henderson, supra, note that concerns for comity and the orderly administration of criminal justice require that in such circumstances as these the federal court should not exercise its habeas corpus power to review a claim on its merits.

If the Court found "manifest injustice" to exist in this case, so as to allow a consideration of the merits of Petitioner's allegedly illegally composed jury on its merits,

this Court would in effect be nullifying the valid concerns of the state in legislatively providing for a state procedural waiver rule. Petitioner simply did not preserve this issue for review and therefore, it is not "manifest injustice" to prevent a habeas corpus petitioner who has committed a "triple procedural default," from being allowed to litigate on its merits a claim which he has admittedly waived his rights to adjudicate under state law.

In rejecting Petitioner's "manifest injustice" claim, the United States Court of Appeals for the Eleventh Circuit properly analogized this case to the decision of this Court in Daniel v. Louisiana, 420 U.S. 31 (1975). In Daniel v. Louisana, supra, the court found that even in the presence of a case in which there was no procedural default by a defendant, that unconstitutional jury composition does not necessarily render a criminal trial unfair. Where as here, there was a procedural default and Petitioner has not established cause or prejudice, the conclusion must be inexorably reached that no manifest injustice would result from the application of the waiver principles contained in both state and federal law.

As this case presents a classic example of circumstances under which the waiver principle should be applied, in the absence of a showing of cause and prejudice to exempt a petitioner from a state procedural waiver rule, this issue presents nothing for review by this court.

CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a writ of certiorari filed on behalf of John Eldon Smith, there being no substantial federal question presented review for reivew by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition to the Petition for a Writ of Certiorari by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This 14th day of October, 1983.

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